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Supreme Court of the United States

October Term, 1977.

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

JURISDICTIONAL STATEMENT.

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INDEX.

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	4
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
THE QUESTIONS ARE SUBSTANTIAL	26
A. The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause	26
B. P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce	31
C. Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim	44
D. A State Statute That Prohibits Persons From Bringing Solid and Liquid Waste Into a State Is in Conflict With a Federal Statute That (a) Requires Cooperation in the Establishment of Solid Waste Management Plans for Interstate Regions, and (b) Provides for the Issuance of Federal Permits to Owners and Operators of Hazardous Waste Treatment, Storage or Disposal Facilities	51
Hazardous Waste Management	53
Interstate Solid Waste Management	56
CONCLUSION	59

TABLE OF CITATIONS.

Cases:	Page
Alexandria Scrap Corporation v. Hughes, 391 F. Supp. 46 (Md. 1975), rev. 426 U. S. 794 (1976)	29
Asbell v. Kansas, 209 U. S. 251 (1908)	33
Baldwin v. G. A. F. Seelig, 294 U. S. 511 (1935)	42
Best & Co. v. Maxwell, 311 U. S. 454 (1940)	33, 38
Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937)	32
Brimmer v. Rebman, 138 U. S. 78 (1891)	35
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (1930)	3, 50
Cities Service Co. v. Peerless Co., 340 U. S. 179 (1950)	32
City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W. D. Tex. 1966), aff'd 385 U. S. 35 (1966)	41
City of Burbank v. Lockheed Air Terminal, 411 U. S. 624 (1973)	59
Colorado Comm'n v. Continental, 372 U. S. 714 (1963)	59
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282 (1921)	26
Dean Milk Co. v. Madison, 340 U. S. 349 (1951)	3, 32, 33
Douglas v. Seacoast Products, Inc., – U. S. – (1977)	3, 39, 53, 54
Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266 (1933)	26
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 110 (1928)	26, 30
FPC v. Florida Power & Light Co., 404 U. S. 453 (1972)	26
Gibbons v. Ogden, 9 Wheat. 1 (1824)	54
Grannis v. Ordean, 234 U. S. 385 (1914)	49
Great A. & P. Tea Co. v. Cottrell, 424 U. S. 366 (1976)	3, 32
Hackensack Meadowlands v. Mun. Landfill Auth., 127 N. J. Super. 160 (Ch. 1974), rev. 68 N. J. 451 (1975), prob. juris noted 425 U. S. 910 (1976), remanded *sub nom.* Philadelphia v. New Jersey, – U. S. – (1977)	passim
Head v. New Mexico Board, 374 U. S. 424 (1963)	38
Hines v. Davidowitz, 312 U. S. 52 (1940)	52
H. P. Hood & Sons, Inc. v. Dumond, 336 U. S. 525 (1949)	39
Hunt v. Washington State Apple Advertising Commission, – U. S. – (1977)	3, 33, 43

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
Huron Cement Co. v. Detroit, 362 U. S. 440 (1960)	3, 38, 39, 54
Jones v. Rath Packing Co., – U. S. – (1977)	3, 51, 59
Judson v. Peoples Bank & Trust Co. of Westfield, 17 N. J. 57 (1954)	44
Minnesota v. Barber, 136 U. S. 313 (1890)	36
Mullane v. Central Hanover Tr. Co., 339 U. S. 306 (1950)	49
Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229 (1911)	3, 41
Oreg.-Washington Co. v. Washington, 270 U. S. 87 (1926)	3, 36, 37
Penna. v. West Virginia, 262 U. S. 553 (1923)	3, 40
Perez v. Campbell, 402 U. S. 637 (1971)	52, 58
Philadelphia v. New Jersey, – U. S. – (1977), on remand – N. J. – (1977)	passim
Pike v. Bruce Church, Inc., 397 U. S. 137 (1970)	3, 33
Pipe Line Cases, 234 U. S. 548 (1914)	26
Plumley v. Massachusetts, 155 U. S. 461 (1894)	32, 35
Polar Ice Cream & Creamery Co. v. Andrews, 375 U. S. 361 (1964)	42
Public Utilities Comm. v. Landon, 249 U. S. 236 (1919)	26
Railroad Co. v. Husen, 95 U. S. 465 (1877)	3, 34, 35
Rasmussen v. Idaho, 181 U. S. 198 (1901)	36, 37, 38
Rearick v. Pennsylvania, 203 U. S. 507 (1906)	26
Rhodes v. Houston, 202 F. Supp. 624 (D. Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert.* den. 372 U. S. 909 (1963), 383 U. S. 971 (1966)	50
Savage v. Jones, 225 U. S. 501 (1912)	32
Schollenberger v. Pennsylvania, 131 U. S. 1 (1898)	32
Scott v. Donald, 165 U. S. 58 (1897)	36
Shafer v. Farmers Grain Co., 268 U. S. 189 (1925)	26
Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945)	32
Telegraph Co. v. Texas, 105 U. S. 460 (1882)	26
Thornton v. United States, 271 U. S. 414 (1926)	26
United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E. D. Pa. 1965), aff'd 357 F. 2d 806 (3rd Cir. 1966), cert. den. 384 U. S. 961 (1966)	27, 28

TABLE OF CITATIONS (Continued).

Statutes: Page

United States

15 U. S. C. § 1 27
28 U. S. C. § 1257(2) 2, 3
28 U. S. C. § 1257(3) 2, 3
42 U. S. C. § 3251 23
42 U. S. C. § 6901 23
42 U. S. C. § 6923 53
42 U. S. C. § 6924 53
42 U. S. C. § 6925 53
42 U. S. C. § 6929 53
42 U. S. C. § 6942(a) 56
42 U. S. C. § 6944 43
42 U. S. C. § 6946(c)(1) 56
42 U. S. C. § 6946(c)(2) 56
42 U. S. C. § 6972(a) 57

New Jersey

N. J. S. A. 13:1E-1 ..... 29, 30
N. J. S. A. 13:1E-2c 30
N. J. S. A. 13:1E-38 ..... 54, 55
N. J. S. A. 32:22B-1 8
N. J. S. A. 48:2-13 29
N. J. S. A. 48:13A-1, et seq. 29
P. L. 1973, c. 363 ..... passim

Connecticut

C. G. S. A. § 16-339 8

Pennsylvania

35 P. S. § 6007 42

New York

McK Unconsol. Laws § 830 8

TABLE OF CITATIONS (Continued).

Constitutional Provisions: Page

U. S. Constitution

Article 1, Sec. 8, cl. 3 ..... 18, 19, 20
Fifth Amendment 59
Tenth Amendment 32
Fourteenth Amendment 59

Administrative Regulations:

United States

40 CFR § 255 57
40 CFR § 255.10 57
40 CFR § 255.10(a) 57
40 CFR § 255.24 57
40 CFR § 255.24(c) 57

New Jersey

N. J. A. C. 7:1-4 15
N. J. A. C. 7:1-4.2 15
N. J. A. C. 7:26-1, et seq. (proposed) 17, 29

Other Authorities:

New Jersey State Sanitary Code 10
New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) 10

INDEX TO APPENDIX.

	Page
Transcript of Oral Opinion of Trial Court	A1
Opinion of Superior Court of New Jersey, Chancery Division, in Companion Case *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160 (Ch. 1974)	A9
Opinion of New Jersey Supreme Court in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451, 348 A. 2d 505 (1975)	A27
Opinion of Supreme Court of the United States in *Philadelphia v. New Jersey*, – U. S. – (1977)	A54
Opinion of New Jersey Supreme Court on Remand in *Philadelphia v. New Jersey*, – N. J. – (1977)	A57
State Statute Involved–*P. L.* 1973, *c.* 363, Approved January 2, 1974	A70
State Administrative Regulation Involved–N. J. A. C. 7:1-4	A72
Appellants' Complaint Filed in Trial Court	A77
Affidavit of Richard Peluso Dated January 16, 1974	A100
Letter Dated December 26, 1973 From Richard W. DeKorte, Esq., Counsel to Governor Cahill, to David Quient, Esq.	A103
Order to Show Cause With Restraints	A105
Order Granting Interlocutory Injunction	A108
Affidavit of Arsen J. Darnay, Dated January 29, 1974	A110
Appellees' Answer to Complaint	A116
Portion of Transcript of Deposition of Lino F. Pereira Taken on March 13, 1974	A124
Motion for Summary Judgment	A133
Portion of Brief Filed in Trial Court by Appellees	A135
Notice of Appeal Filed by Appellees on April 23, 1974	A136
Motion for Stay of Judgment	A138
Denial of Motion for Stay of Judgment	A140
Excerpts From Brief of Appellants, State of New Jersey, Filed in the Appellate Division (Pages 17-18)	A142

INDEX TO APPENDIX (Continued).

	Page
Certification of Appeal by New Jersey Supreme Court	A143
Order of New Jersey Supreme Court Granting Stay of Judgment to Appellants on Emergency Basis	A145
Application for Stay of Judgment and Other Relief to New Jersey Supreme Court by Appellants	A147
Order of New Jersey Supreme Court Denying Motion for Stay	A152
Order of New Jersey Supreme Court Vacating Temporary Stay Effective December 31, 1975	A153
Order of New Jersey Supreme Court Granting Motion for Remand	A154
Order of Superior Court of New Jersey, Law Division, Dated December 19, 1975	A155
Order of Mr. Justice William J. Brennan, Jr. Dated December 31, 1975 Granting Stay of Judgment	A157
Notice of Appeal Filed January 9, 1976	A158
Order of Mr. Justice William J. Brennan, Jr. Dated July 18, 1977 Granting Stay of Judgment	A160
Notice of Appeal Filed July 22, 1977	A162
Affidavit of Leo F. Hughes, 3rd Dated January 16, 1974	A165
Exhibit A	A170
Exhibit B	A172
Exhibit C	A174
Motion for Clarification or, in the Alternative, for Stay Pending Completion of Remand and for Expedited Briefing and Argument	A175
Order Dated April 4, 1977 Granting Motion for Acceleration, etc.	A176
Affidavit of Frank J. Kuserk Dated May 6, 1977	A177
Affidavit of Ray Rothschild Dated June 27, 1977	A179
Affidavit of Wilbur Henry Dated May 5, 1977	A181

INDEX TO APPENDIX (Continued).

	Page
Affidavit of Robert Meagher Dated May 5, 1977	A188
Affidavit of Norman Rosenfarb Dated May 5, 1977	A189
Affidavit of Ronald Kiley Dated May 6, 1977	A191
Affidavit of Vincent A. Suozzi Dated July 6, 1977	A193
Affidavit of Richard A. Peluso Dated June 29, 1977	A195
Affidavit of Richard A. Peluso Dated March 30, 1977	A199
Affidavit of Richard A. Peluso Dated November 25, 1975	A202
Affidavit of Marvin Mahan Dated July 6, 1977	A207
Affidavit of Marvin Mahan Dated November 25, 1975	A210
Affidavit of Leo F. Hughes Dated July 6, 1977	A214
Affidavit of Leo F. Hughes, 3rd Dated November 18, 1975	A218
Affidavit of Milton Berkes Dated January 29, 1974	A220

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1977.

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No.

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

JURISDICTIONAL STATEMENT.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:11-9, 10) unconstitutional is not reported (A1). The opinion

of the Superior Court of New Jersey, Chancery Division, in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711 (A9). The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975) (A27). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Jurisdictional Statement. The opinion of the New Jersey Supreme Court, on remand from this Court, is not yet published in either the official or the unofficial reports (A57). Said opinion is cited as *Philadelphia v. New Jersey*, – *N. J.* – (1977) in the within Jurisdictional Statement.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside two separate judgments of the New Jersey Supreme Court. The first judgment, which upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Commerce Clause grounds, was rendered on November 18, 1975 and entered on the same date. This Court noted probable jurisdiction over the appeal on April 5, 1976, 425 *U. S.* 910 (1976). Following oral argument, this Court vacated the judgment of the New Jersey Supreme Court and remanded the case "for reconsideration in light of the Resource Conservation and Recovery Act of 1976", *Philadelphia v. New Jersey*, – *U. S.* – (1977) (Slip sheet opinion, pp. 1-2) (A54). The second judgment, which was

rendered and entered on June 20, 1977, upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Supremacy Clause grounds, and additionally "reaffirm[ed] the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above" (A69). A notice of appeal to the Supreme Court of the United States from both judgments was thereafter filed in the New Jersey Supreme Court on July 22, 1977 (A162). The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3). Appellants believe the following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the New Jersey Supreme Court in this matter:

Hunt v. Washington State Apple Advertising Commission, – *U. S.* – (1977)
Douglas v. Seacoast Products, Inc., – *U. S.* – (1977)
Jones v. Rath Packing Co., – *U. S.* – (1977)
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 *U. S.* 366 (1976)
Pike v. Bruce Church, 397 *U. S.* 137 (1970)
Huron Cement Co. v. Detroit, 362 *U. S.* 440 (1960)
Dean Milk Co. v. Madison, 340 *U. S.* 349 (1951)
Brinkerhoff-Faris Co. v. Hill, 281 *U. S.* 673 (1930)
Oreg.-Washington Co. v. Washington, 270 *U. S.* 87 (1926)
Penna. v. West Virginia, 262 U. S. 553 (1923)
Oklahoma v. Kansas Nat. Gas Co., 221 *U. S.* 229 (1911)
Railroad Co. v. Husen, 95 *U. S.* 465 (1977).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is the interstate movement of solid or liquid waste for purposes of resource recovery, treatment or disposal "commerce" within the meaning of the Commerce Clause?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place and undue burden upon interstate commerce?

3. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard on the material issues of fact raised by their complaint prior to the final determination?

4. Is a state statute that prohibits persons from bringing solid and liquid waste into a state in conflict with a federal statute that (a) requires cooperation in the establishment of solid waste management plans for interstate regions, and (b) provides for the issuance of federal permits to owners and operators of hazardous waste treatment, storage or disposal facilities?

STATEMENT OF THE CASE.

This case challenges the constitutionality, on Commerce and Supremacy Clause grounds, of a statute which prohibits a person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." *P. L.* 1973, *c.* 363.

Legislative efforts to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State were first initiated seven years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[1] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[2] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for the disposal of solid wastes originating in the State."

1. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

2. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[3]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State. In his "statement" attached to the bill, the sponsor commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an unfortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[4] the President of the New Jersey Public Utilities Commission urged the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may

3. Information with respect to bills introduced in the New Jersey Legislature is available in the New Jersey Legislative Index.

4. See footnote 2, *supra*.

find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132 passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the Public Utilities Commission was not accepted. Section 4 of the Act granted to the Commissioner of the Department of Environmental Protection the specific

> "power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.
>
> *N. J. S. A.* 13:1I-4a

Upon signing the bill, the Governor issued a press release [5] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Two and one-half months later, on May 7, 1973, at a conference on waste management sponsored by the Tri-State Regional Planning Commission,[6] Grant F. Walton, Director of the Division of Environmental Quality, New

5. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

6. Said Commission was formed by virtue of an interstate compact between the states of Connecticut, New Jersey and New York C. G. S. A. § 16-339 *et seq.* McK Unconsol. Laws § 830 *et seq.*; N. J. S. A. 32:22B-1 *et seq.*

Jersey Department of Environmental Protection, made reference to the newly-enacted statute, saying:

> "I mentioned that New Jersey had just passed legislation to give us control over the material that comes in from out of state. . . ."
>
> • • •
>
> ". . . The great temptation would be just to prohibit all materials from coming into the state of New Jersey . . . *but we don't feel that is responsible or realistic.*" [7]
>
> (Emphasis added)

The expressed temptation to prohibit was motivated by political rather than environmental concerns for in his prepared address at the Waste Management Conference, Mr. Walton acknowledged the environmental integrity of sanitary landfills and their potential for reclaiming ravaged lands for public recreational use: "The health hazard, water and air pollution and methane gas problems commonly associated with landfills," he said, "can be eliminated through the proper design and operation of the facility . . . Properly done, abandoned surface mines can become parks, playgrounds and golf courses of the future with little or no detriment to the environment." [8]

7. Presentation by Grant F. Walton published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, *p.* 101.

8. *Id.*, at 74.

An identical conclusion was expressed in the New Jersey Solid Waste Management Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm."
>
> • • •
>
> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area.
>
> • • •

Consistent with Mr. Walton's remarks no action was taken by the Commissioner of the Department of Environmental Protection to prohibit the incineration or landfill in New Jersey of solid waste collected outside the state.

Almost 8 months passed without further visible activity. Then on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release saying, in part:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey.
>
> • • •
>
> "[If a ban is not promptly imposed], the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up."[9]

8. (Cont'd.)

"The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards."

New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) pp. 2, 71 and 78.

9. The text of the entire press release reads as follows:

"I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Section 7:26-1-8 of the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste in New Jersey.[10]

The New Jersey Department of Environmnetal Protection expressed the reasons for the proposed ban in para-

10. The text of the proposed rule read as follows:

7:26-1.8 Out of State Waste

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

graph IV of its "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A170). Not unexpectedly, references to public health and environmental quality are virtually non-existent. Rather, the reasons presented for the proposed administrative prohibition were: (1) to assure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[11]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[12]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[13] was surprisingly candid:

"A. Description of Bill's Effect—

> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was*

11. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A80, 117).

More particularly in the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", the Department commented: "The failure on the part of our neighboring states to provide suitable disposal facilities of their own . . . *is increasing the cost of disposal for our own municipalities.*" (A170).

12. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

13. See footnote 2, *supra*.

> *taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"
>
> • • •

"E. Departmental Comments—

> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."
>
> • • •

(Emphasis added)

The "major difficulty" identified by the Department was competition for the purchase of landfill disposal space. Environmental considerations were noticable in their absence.

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to

David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A103), saying:

• • •

> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363, to become effective February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A77). Their simultaneous application for a temporary restraining order was supported, among other documents, by an affidavit of a licensed professional engineer (A100) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey." [14]

Based upon its conclusion that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division, issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A105). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [15]

14. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See *p.* 17 *infra.*

15. N. J. A. C. 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated, or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous, waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered

(A108). In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A110), which averred in pertinent part, as follows:

• • •

> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [N. J. A. C. 7:1-4]
>
> • • •
>
> . . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, *the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.*
>
> • • •
>
> The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning.

15. (Cont'd.)
with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."
A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A72.

> We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.
>
> • • •
>
> . . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.
>
> In conclusion, *it is EPA policy that no* municipality or *State should take action to prevent the free flow of waste across* municipal or *state boundaries* provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices."
>
> (Emphasis added)

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974.

On February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that a principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State (A91, 119). They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A81, 117).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the

engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A126-127), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[16] He also revealed that no effort had been made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A129, 132).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A133).[17] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A135), that summary judgment not be granted to appellants pending a hearing on the merits:

16. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

17. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact.

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A1) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A136), by which they appealed from the trial court's

grant of summary judgment to appellants, but not from the denial of their own motion for summary judgment.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A138). Said motion was denied by the Court on August 14, 1974 (A140).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[18] by order dated October 7, 1974 (A223). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution

18. In *Hackensack Meadowlands*, suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A27).

By its ruling, the New Jersey Supreme Court disposed, on the mertis, of a case concededly involving substantial disputed issues of material fact which had never been heard by the trial court.[19] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants' complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants' emergent motion for a stay of judgment and interim injunctive relief pending its further order (A145).

In an effort to remedy the aforesaid procedural impropriety, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A147). The trial court indicated that it would hold a plenary hearing within two weeks. In the alternative, appellants

19. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception, were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the New Jersey Rules of Court, the only question before the Supreme Court of New Jersey was whether the trial court correctly granted summary judgment to appellants.

sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the emergency stay that it had previously issued, effective December 31, 1975, and further

> "Ordered that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> Ordered that this Court does not retain jurisdiction." (A154).

Based upon this order, appellants were compelled, as a practical matter, to dismiss with prejudice every count in their complaint which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A155), the trial court

> "Further Ordered, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975 (A157). Appellants duly filed a notice of appeal and a jurisdictional statement. Thereafter, probable jurisdiction was noted on April 5, 1976, 425 *U. S.* 910.

On October 21, 1976, thirteen days before the scheduled date of oral argument, the President of the United States signed the Resource Conservation and Recovery Act of 1976, *Pub. Law* 94-580, 42 U. S. C. § 6901 *et seq.*, which amended comprehensively the Solid Waste Disposal Act, 42 U. S. C. § 3251 *et seq.*

At oral argument held on November 3, 1976, a question was posed by Mr. Justice White with respect to the effect of the aforesaid federal legislation on the matter before the Court. Appellants thereafter filed a motion seeking leave to submit a supplemental brief dealing with the effect of the Resource Conservation and Recovery Act of 1976 upon the validity of *P. L.* 1973, *c.* 363. Said motion was granted by order dated November 15, 1976 and supplemental briefs were filed simultaneously by both parties.

On February 23, 1977, a majority of the United States Supreme Court issued a *per curiam* opinion vacating the judgment of the New Jersey Supreme Court and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976, *Philadelphia v. New Jersey*, – *U. S.* – (1977) (Slip sheet opinion, pp. 1-2) (A54), saying, in pertinent part, as follows:

> "While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and

not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1977 pre-empts the New Jersey statute." [20]

Since the case was remanded for consideration of a statute enacted after probable jurisdiction was noted on April 5, 1976, the questions raised by the appeal from the November 18, 1975 judgment of the New Jersey Supreme Court have not yet been resolved.

Although the stay issued by Mr. Justice Brennan was in effect for more than a year immediately preceding the judgment of the United States Supreme Court, appellees never moved for an order to modify or vacate same. However, 20 days after this Court issued its opinion, on March 15, 1977, appellees moved the New Jersey Supreme Court for clarification or, in the alternative, ". . . for a stay of any lower court injunctive order which may be found presently to bar enforcement of Chapter 363 . . . ." (A175).[21] Appellees further moved for an expedited schedule in connection with the remand.[22]

20. Mr. Justice Powell, speaking for four members of the Court, dissented commenting, "We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty."

21. On the date appellees' motion was filed, the United States Supreme Court—and not the New Jersey Supreme Court—still had jurisdiction of the appeal. Pursuant to Rule 59 of the Rules of the United States Supreme Court, jurisdiction remains vested in the Supreme Court until the issuance of its mandate, an event occurring 25 days after the issuance of its opinion.

22. The motion for acceleration was not opposed by appellees.

By order dated April 4, 1977, the New Jersey Supreme Court granted appellees' motion for acceleration, but reserved decision on the application for a stay:

> "This matter having been duly presented to the Court, it is . . . further
>
> ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further
>
> • • •
>
> ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted." (A176)

Following oral argument, the New Jersey Supreme Court handed down its opinion on June 20, 1977, holding that *P. L.* 1973, *c.* 363 was not pre-empted, under the Supremacy Clause, by the Resource Conservation and Recovery Act of 1976 (A57). However, it stayed its judgment for a period of 30 days "to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment". *Philadelphia v. New Jersey* — *N. J.* — (1977) (slip opinion, p. 19) (A69).

Appellants duly filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on July 18, 1977 (A160).

THE QUESTIONS ARE SUBSTANTIAL.

A.

The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause.

In the proceedings before the New Jersey Courts, appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore are not within the purview of the Commerce Clause. This contention was rejected below, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 64 *N. J.* 451, 467 (1975), and is wholly unsupportable in law and in fact.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business." *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928); *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925); *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). This Court has consistently defined commerce in broad terms to include all commercial intercourse, including the component parts thereof, *Dahnke-Walker Co. v. Bondurant*, 257 *U. S.* 282, 290 (1921). Thus, the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972) and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle meandering across a state line, *Thorton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914) and telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882), have all been treated as commerce in a federal constitutional sense.

Not surprisingly, the proposition that solid waste collection and disposal is commerce has already been established by the federal courts.

In *United States v. Pennsylvania Refuse Removal Assn.*, 242 F. Supp. 794 (E. D. Pa. 1965), certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal." 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' argument that a worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce'* as used in the Act, United States v. Nat'l Ass'n of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n., 242 F. Supp., supra*, at 700 (Emphasis added).

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which

succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F. 2d* 806, 808 (3 Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is often a merchantable commodity.

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J.* Super. 160, 170 (Ch. Div. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, Judge (now Justice) Schreiber rejected appellees argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity." The New Jersey Supreme Court agreed, saying, ". . . certain types of solid waste may have legitimate market value for recycling or other purposes." *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467.

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary landfill facilities within the State (A170), and that certain communities and industries in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A131-132, 181-186). The City of Yonkers, New York and Appellant City of Glen Cove have also purchased disposal space from private solid waste disposal public utilities in New Jersey, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 476 (A50, 193). In addition automobile hulks, being a form of bulky waste,

N. J. A. C. 7:26-1.43, regularly move in interstate commerce, *Alexandria Scrap Corporation v. Hughes*, 426 *U. S.* 794 (1976). Indeed, the House Report on the Resource Conservation and Recovery Act of 1976 candidly asserts "that most of our discarded materials have at some time entered the flow of interstate commerce." [23] It is part of the established course of business.

Governed by the aforesaid authorities, the interstate movement of solid waste for purposes of resource recovery, treatment or disposal unquestionably involves commercial intercourse.

Appellants' solid waste collection and disposal companies are New Jersey public utility corporations subject to regulatory control by the Board of Public Utility Commissioners, *N. J. S. A.* 48:2-13, *N. J. S. A.* 48:13A-1 *et seq.* Although a major component of their business activity is service, see *N. J. S. A.* 48:13A-2, they may also engage in the sale of methane gas, steam or other power-generating sources and recovered materials such as paper, glass, copper, steel, tin and aluminum (A198, 206).

In a very real sense, appellant solid waste disposal companies which operate sanitary landfills derive their principal business income from selling space for disposal purposes rather than from providing a service. The cost of operating sanitary landfills in an environmentally sound manner is usually quite substantial (A197, 212). Thus the New Jersey Legislature, in the Solid Waste Management Act, *N. J. S. A.* 13:1E-1 *et seq.* felt compelled to observe:

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities and other solid

23. House Report No. 94-1491 accompanying HR 14496 (Comm. on Interstate and Foreign Commerce), at 9.

waste collectors to guarantee the flow of solid waste to such facilities."

N. J. S. A. 13:1E-2c

If prevented from obtaining sufficient minimum quantities of solid waste, the business of Kinsley's and of other appellant sanitary landfill owners will be greatly diminished or destroyed (A208-209, 212-213, 216, 219), *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8. This result would be particularly harsh and inequitable in the present case since expenditures for environmental controls approximating $500,000 have already been made at appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A212). The improvements would not have been made but for a long term contract with the City of Philadelphia (A212).

Appellant Landfill and Development Company is in a similar position (A196-197, 216). Unless *P. L.* 1973, *c.* 363 is struck down, it will lose approximately $700,000 in annual gross income (A215).

Moreover, if the interstate movement of solid waste for purposes of resource recovery, treatment or disposal is not commerce, then individual states can adopt repressive laws with impunity, thereby materially affecting channels of interstate commerce in solid waste.

Since probable jurisdiction was noted by this Court on April 5, 1976, a statute was passed by the Louisiana Legislature to proscribe the transportation of

> "any waste material which originated or was collected outside the territorial limits of the state into Louisiana with the intent to bury, store or otherwise dispose of such wastes in Louisiana until the office of health services and environmental quality of the Department of Health and Human Resources has determined that such action can be permitted without endangering the health, safety and welfare of any member of the public or animal life."

Prior to the adoption of said statute, seven states had adopted laws which, to varying degrees, prohibited the disposal of solid waste collected in another state.[24] Three other states imposed various regulatory limitations.[25]

If each state was free to pass such laws, commerce in solid waste collection and disposal services could be brought to a halt at state lines.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and dis-

24. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

25. Delaware, Illinois and Louisiana.

posal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. Absent controlling federal legislation, the Commerce Clause does not deprive the states of the power to regulate matters of legitimate local concern in areas where uniformity of regulation is not necessary, even when interstate commerce is, to some measure, regulated or affected thereby, *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 767 (1945).

However, in exercising its power, a state must be reasonable in its requirements, promote its objectives without discrimination, and not go beyond the necessities of the particular case, *Plumley v. Massachusetts*, 155 *U. S.* 461, 471 (1894), *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), *Savage v. Jones*, 225 *U. S.* 501, 525 (1912), *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937), *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), *Great A & P Tea Co. v. Cottrell*, 424 *U. S.* 366 (1976). As stated by Mr. Justice Clark in *Cities Service Co. v. Peerless Co.*, 340 *U. S.* 179, 186-187 (1950):

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of the state restrictions."

See also *Pike v. Bruce Church Inc.*, 397 *U. S.* 137, 142 (1970); *Hunt v. Washington State Apple Advertising Commission*, – *U. S.* – (1977).

In approaching Commerce Clause questions, this Court has consistently determined for itself whether a regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce, *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). Mr. Justice Reed emphasized the Court's responsibility in this area in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

> ". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The aforesaid principles were applied in *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877) where this Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

> "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute,

> we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered . . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."
>
> *Rasmussen v. Idaho*, 181 *U. S. supra.* at 201 (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from

designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

> "We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."
>
> *Oreg.-Washington Co. v. Washington* 270 *U. S., supra,* at 96.

The New Jersey statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior* to exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra,* at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State

or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell,* 311 *U. S.* 454 (1940); *Head v. New Mexico Board,* 374 *U. S.* 424, 429 (1963).

A proscription against discrimination was similarly noted in the leading environmental case *Huron Cement Co. v. Detroit,* 362 *U. S.* 440 (1960), where an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> ". . . state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to any person, firm or corporation within the city, discriminates against interstate commerce as such. It *is a regulation of general application,* designed to better the health and welfare of the community . . . ." *Huron Cement Co. v. Detroit,* 362 *U. S., supra,* at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . , or unduly burdensome on* maritime activities or *interstate commerce. . . .*"
>
> *Huron Cement Co. v. Detroit,* 362 *U. S. supra,* at 443 (Citations omitted, emphasis added).

The Court in *Huron* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it would have been struck down.

Appellants respectfully contend that *P. L.* 1973, *c.* 363, while outwardly cloaked "in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.,* — *U. S.* — (1977), is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents, *H. P. Hood & Sons, Inc. v. DuMond,* 336 *U. S.* 525, 538 (1949).

The New Jersey Department of Environmental Protection explained the process this way:

> "In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban

on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collection of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. *This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburban and rural areas.*" (A170) (emphasis added)

An identical sentiment was expressed by Acting Governor Beadleston who, on October 19, 1973, directed the Commissioner of the Department of Environmental Protection to initiate a ban upon the disposal in New Jersey of out-of-state garbage: ". . . the people of New Jersey," he said, "will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up", See p. 10, n. 9 *supra*. The record demonstrates overwhelmingly that the motivation for imposing the embargo was economic rather than environmental.

Appellees admit that in enacting *P. L.* 1973, *c.* 363, a principal concern of the New Jersey Legislature was to preserve landfill areas in New Jersey for solid waste generated in the State (A 91, 119). This it cannot constitutionally do.

In *Penna. v. West Virginia*, 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers."

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State,* and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W. D. Tex. 1966), aff'd 385 U. S. 35 (1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of

Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory against New Jersey in operation and effect (A220).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principal eloquently in *Baldwin v. G. A. F. Seelig,* 294 *U. S.* 511, 523 (1935). In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he observed:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews,* 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and is devoid of any legitimate local concern.

But even if, for the sake of argument, a legitimate local concern is found, that does not end the inquiry: "When discrimination against commerce . . . is demonstrated" said Mr. Chief Justice Burger less than 3 months ago, "the burden falls on the State to justify it both in

terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission,* — *U. S.* — (1977).

Appellees have argued that a prohibition against out-of-state solid waste will reduce volume and thereby preserve further acreage from use as disposal sites. There are two inherent fallacies with this reasoning. Firstly, sanitary landfills can be operated without any "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 *U. S. C.* § 6944. Secondly, *any* prospective use of land is subject to objection on the same grounds. For example, the erection and operation of a manufacturing plant can be said to "forever ruin virgin land" and, if not properly regulated, to cause a threat to public health or environmental quality.

For the same reasons, appellees cannot justify the statute on account of the unavailability of nondiscriminatory alternatives. If the environmental integrity of sanitary landfills can be reasonably controlled by the promulgation and enforcement of appropriate regulations, then there is no justification for discrimination.

Although countless opportunities were presented, appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste

is such that it will always spread pestilence and disease. Quite to the contrary, appellees have admitted that properly designed and regulated sanitary landfills can be operated with no reasonable likelihood of harm to the public or to the environment (A127).

Interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce, which should not be disturbed.

C.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the

> motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants' motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They, like appellees, acknowledged the existence of other issues upon which summary judgment could not be granted (A135).

The trial judge's opinion reveals his determination as a matter of federal constitutional law (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A136) appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution

of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon

interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result lacked fundamental fairness. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A135):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.*

363 was not being attacked on Commerce Clause grounds alone.[26]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A154). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that *P. L.* 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment initially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

26. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

As a practical consequence of this action,[27] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean*, 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.*, 339 *U.S.* 306 (1950).

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination.

27. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who twice stayed the mandate of the New Jersey Supreme Court.

Rhodes v. Houston, 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.*, *supra*, at 678. It was asserted a second time less than two weeks later in a motion addressed to the New Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A343),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

D.

A State Statute That Prohibits Persons From Bringing Solid and Liquid Waste Into a State Is in Conflict With A Federal Statute That (a) Requires Cooperation in the Establishment of Solid Waste Management Plans for Interstate Regions, and (b) Provides for the Issuance of Federal Permits to Owners and Operators of Hazardous Waste Treatment, Storage or Disposal Facilities.

The test to determine whether federal law precludes the enforcement of a state statute on Supremacy Clause grounds was expressed by the United States Supreme Court less than 6 months ago in *Jones v. Rath Packing Co.*, — *U. S.* — (1977). Speaking for seven members of the Court, Mr. Justice Marshall observed:

> "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U. S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, the [state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1940). Accord, *DeCamas v. Bica*, 424 U. S. 351, 363 (1976); *Perez v. Campbell*, 402 U. S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, at 141; id., at 165 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *DeCamas v. Bica*,

supra, at 363-365; *Swift & Co. v. Wickham,* 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U. S. 111 (1965), aff'd 364 F. 2d 241 (CA 1 1966), cert. denied, 385 U. S. 1036 (1967)."

Appellants respectfully submit that *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz,* 312 *U. S.* 52, 67 (1940).

The procedure for considering Supremacy Clause questions was set forth several years ago by Mr. Justice White in *Perez v. Campbell,* 402 *U. S.* 637, 644 (1971) as follows:

> "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

P. L. 1973, *c.* 363 has already been construed by the New Jersey Supreme Court: it prohibits any person from bringing into New Jersey any solid or liquid waste which originated or was collected outside the State, except garbage to be fed to swine, until permitted and regulated by the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "Commissioner"), *Hackensack Meadowlands v. Mun. Landfill Auth.,* 68 *N. J.* 451, 468 (1975).

The Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA") has not yet been construed. However, its expressed direction in relation to hazardous waste management and to interstate solid waste management is clear and unambiguous.

Hazardous Waste Management.

Not later than 18 months after the date of enactment of Sections 3003, 3004 and 3005 of RCRA, 42 *U. S. C.* §§ 6923, 6924 and 6925, the Administrator of the United States Environmental Protection Agency (hereinafter "Administrator") must promulgate regulations (a) establishing standards, applicable to transporters of hazardous waste, as may be necessary to protect human health and the environment, (b) establishing standards, applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste as may be necessary to protect human health and the environment, and (c) requiring each person owning or operating a facility for hazardous waste treatment, storage or disposal to secure a permit for such facilities.

Upon the effective date of the aforesaid regulations, a State is prohibited, with certain exceptions not material here, from imposing any requirements less stringent than those adopted by the Administrator, 42 *U. S. C.* § 6929.

The effect of restrictive state legislation upon federal licensees was recently reviewed in *Douglas v. Seacoast Products, Inc.,* — *U. S.* — (1977). Speaking for seven members of the Court in striking down a Virginia statute which, in effect, prohibited non-residents of Virginia from catching menhaden in the Virginia portion of the Chesapeake Bay, Mr. Justice Marshall declared:

> "A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both pro-

tective and retaliatory measures. Each State's fisherman eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishing beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent."

While a state may impose reasonable conservation regulations to protect its vital resources, such measures must be designed to effectuate a legitimate local public interest in an evenhanded manner, *Huron Cement Co. v. Detroit*, 362 *U. S., supra* at 443; *Douglas v. Seacoast Products, Inc.*, — *U. S., supra.*

The issuance of a federal license or permit implies a right to carry on the activity for which the license is issued, *Gibbons v. Ogden*, 9 *Wheat.* 1 (1824). In the context of the present litigation, the evident purpose of a federal permit to operate a hazardous waste disposal facility is to confer upon the holder the right to engage in the activity which gives the permit its real value, namely acceptance from any source of hazardous waste for storage, treatment or disposal, *Douglas v. Seacoast Products, Inc.* — *U. S., supra.*

Less than 1 year ago, the New Jersey Legislature approved a supplement to the Solid Waste Management Act (1970) governing the disposal of hazardous waste, chemical waste, bulk liquids and pesticides in the ground, *N. J. S. A.* 13:1E-38 *et seq.* Section 5 of said supplement provides, in pertinent part, as follows:

"After March 15, 1980, no solid waste facility shall accept or receive for disposal, any hazardous waste, chemical waste, bulk liquid or pesticide unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environment protection] for the entire system."

N. J. S. A. 13:1E-42.

Not surprisingly, the Assembly Energy and Natural Resources Committee which reviewed the Act prior to its passage, discounted good-intentioned concerns about environmental degradation, saying:

". . . As originally introduced, this bill would have prohibited any solid waste facility located within . . . 2 miles of a major aquifer, from accepting such solid waste for disposal. The Senate Energy and Environment Committee changed the '2-mile' limitation to '1,000 yards.'

The Assembly Energy and Natural Resources Committee saw much merit in the sponsor's intentions, but felt that *the prohibition of disposal within 1,000 yards of a major aquifer* was too stringent and *would*, unintentionally, *prevent the location of such solid waste disposal facilities where they would present no danger to the public health and safety. . . .*"

Assembly Energy and Natural Resources Committee Statement to S. 1493 dated August 2, 1976. (Emphasis added)

The position of the Assembly Committee was adopted by the New Jersey legislature. The bill, as enacted, permits the disposal of hazardous wastes and pesticides in all sanitary landfill facilities—even those located in or near major aquifers—provided a system for the interception, collection and treatment of leachate generated at the facil-

ity has been approved by the Department of Environmental Protection and installed at the site.

Since hazardous waste can be discarded in a properly designed, operated and regulated disposal facility with no reasonable prospect of harm to public health or to environmental quality, then there is no legitimate local public interest to be effectuated by the unlimited exclusion from New Jersey of out-of-state hazardous waste. That being the case, *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause for improperly limiting the full use and enjoyment of privileges inhering in a federal permit.

Interstate Solid Waste Management.

There is a second, equally compelling, Supremacy Clause problem with *P. L.* 1973, *c.* 363 which necessitates its invalidity: the statute stands as an obstacle to the establishment of solid waste management plans for interstate regions.

Pursuant to Section 4002 of RCRA, the Administrator must issue guidelines that identify areas "which have common solid waste management problems and are appropriate units for planning regional solid waste management services" within 180 days after the section's enactment, 42 *U. S. C.* § 6942(a). In the event an area identified by the Administrator is in two or more states, the respective Governors are specifically required by federal law to consult, cooperate and fix the precise boundaries of the region, 42 *U. S. C.* § 6946(c)(1). Once the boundaries have been established appropriate elected officials of general purpose units of local government must establish or designate an agency to develop a plan for the region, 42 *U. S. C.* § 6946(c)(2). It is essential to note that the public officials referred to in the federal Act have no discretion in the matter. Congress has mandated that they "shall" take the designated action.[28]

Consistent with the directive contained in 42 *U. S. C.* § 6942, on May 16, 1977, the Administrator promulgated Interim Guidelines for the Identification of Regions and Agencies for Solid Waste Management, 40 *CFR* § 255. Among the criteria listed for identifying regions are "Geographical areas which have a history of cooperating to solve problems in environmental or other related matters", 40 *CFR* § 255.10(a). Preliminary identification of regions is to be made by the Govenor or his or her representative, 40 *CFR* § 255.20, taking into consideration the published criteria for identifying regions, 40 *CFR* § 255.10, as well as the boundaries of Standard Metropolitan Statistical Areas (hereinafter "SMSA"), 40 *CFR* § 255.24(c). Once a Governor recommends the identification of an interstate region, concerned officials in the entire recommended region must be consulted, 40 *CFR* § 255.24.

Significantly, New Jersey and Pennsylvania have a history of cooperating to solve environmental and other problems. In 1966, the two States established the Delaware Valley Urban Area Compact for the coordination of regional planning in the compact area, *N. J. S. A.* 32:27-1 et seq., 73 *P. S.* & 701. Said area specifically included the counties of Burlington, Camden, Gloucester and Mercer in the State of New Jersey, and the counties of Bucks, Chester, Delaware and Montgomery and the City of Philadelphia in the Commonwealth of Pennsylvania, *N. J. S. A.* 32:27-2(b).

The Delaware Valley Regional Planning Commission, which was created by the Compact, quickly identified solid waste planning as one of its statutory responsibilities.

28. Suits to enforce any requirement which has become effective pursuant to the Resource Conservation and Recovery Act of 1976 may be brought by any person, 42 *U. S. C.* § 6972(a).

In 1969, the agency commissioned a 6 volume Regional Solid Waste Management Study for the subject area,[29] as part of its recognized planning function.

Furthermore, the Philadelphia SMSA includes, with the single exception of Mercer County, the very same counties and city participating in the Delaware Valley Urban Area Compact; and that is coterminus with one of the geographical areas involved in this litigation.

It is difficult to conceive how an interstate solid waste management plan can be developed when a participating state prohibits the entry within its borders of solid or liquid waste which originates or is collected outside the territorial limits of the state. A plan cannot be developed and implemented between unwilling participants.

In *Perez v. Campbell*, 402 *U. S., supra,* at 652, the United States Supreme Court re-emphasized the controlling principle "that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states are free to prohibit the entry of solid waste originating in other states.

While it is true that the Committee on Interstate and Foreign Commerce, U. S. House of Representatives, in its report on H. R. 14496, commented: "At this time federal preemption of this [discarded materials] problem is undesirable, inefficient, and damaging to local initiative," p. 33, that remark was directed to the overall "discarded materials problem", and not to the relationship of specific

29. *Regional Solid Waste Management Study Design Materials,* 6 vols. (Philadelphia: University of Pennsylvania, Fels Institute of Local and State Government, 1969) (typewritten manuscripts).

state legislation with particular provision in RCRA. Congress had no intention, either express or implied, to bar concurrent state legislation in the discarded materials area, but it also did not intend to sanction state enactments which would frustrate "any part of the purpose of the federal legislation." *Colorado Comm'n v. Continental,* 372 *U. S.* 714, 724 (1963).

Eleven states have already adopted laws which by their express terms, in varying degrees, directly affect the movement of solid waste in interstate commerce, see pp. 30-31, *supra.* Even if these laws are not in actual conflict with RCRA (which appellants do not concede) they establish an unmistakable potential for conflict, *City of Burbank v. Lockheed Air Terminal,* 411 *U. S.* 624 (1973), *Jones v. Rath Packing Co.,* — *U. S., supra.* This they may not constitutionally do under the Supremacy Clause.

CONCLUSION.

The New Jersey Supreme Court has decided issues of national importance in a way not in accord with the decisions of this Court. It has also so far departed from the accepted and usual courses of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court

be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

HERBERT F. MOORE,
ARTHUR MEISEL,
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER,
A Professional Corporation,
Attorneys for Appellants.

SUPERIOR COURT OF NEW JERSEY.
LAW DIVISION—MERCER COUNTY.
DOCKET NO. L-15068-73 P. W.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF GLEN COVE, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK, LANDFILL & DEVELOPMENT CO., A N. J. CORPORATION, MACSANITARY LANDFILL, INC., A N. J. CORPORATION, KINSLEY'S LANDFILL, INC., A N. J. CORPORATION, AND DELORENZO-INTERSTATE WASTE REMOVAL COMPANY, A N. J. CORPORATION, JOHN P. FAZZIO, INC., T/A JOHN P. FAZZIO LANDFILL COMPANY, AND CONTINENTAL VANGUARD, A N. J. CORPORATION,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Defendants.

ORAL OPINION.

Before:

HONORABLE GEORGE Y. SCHOCH, J.S.C.

Place:

Mercer County Courthouse,
Trenton, New Jersey.

March 25, 1974.

(A1)

Appearances:

JAMIESON, WALSH, MCCARDELL, MOORE & PESKIN, by MR. HERBERT F. MOORE, and ARTHUR MEISEL, appearing on behalf of the plaintiffs, attorneys.

MR. VINCENT J. DOTOLI, appearing on behalf of defendant Fazzio, attorney.

WILLIAM F. HYLAND, Attorney General of the State of New Jersey, by MR. MARK L. FIRST, Deputy Attorney General, appearing on behalf of the defendant-State of New Jersey.

THE COURT: Well, there are three separate points raised by the motions or, I should say, by the motion and countermotion presented here. Each side makes this argument for summary judgment conceding that as to these particular issues there are no material issues of fact involved and so that the issues before the court at the moment are ripe for summary judgment.

The New Jersey Legislature passed a law, Public Law 1973, Chapter 363, which says in part, "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the state, except garbage to be fed to swine in the State of New Jersey, until the Commissioner shall determine such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state."

There were emergency regulations promulgated by the Commissioner, N. J. A. C. 7:1-4.1 and N. J. A. C. 7:1-4.2. The second regulation sets forth certain exceptions, descriptions of exceptions to the prohibition of solid or liquid waste, including separated waste material that is intended for re-cycling and certain other exceptions which are immaterial to the issue at hand.

Obviously the first matter that must be decide is whether the item of solid or liquid waste, we have been calling it garbage but it obviously includes more than just garbage, whether that item is a proper subject of interstate commerce. If it is not then there would be no prohibition against the state passing a law that prohibits the passage or importation of such item either through or into the state, since it would not violate the interstate commerce clause of the United States Constitution.

With reference to that point my attention has been called to two cases. One is the case of *Barnett v. A-1 Scavenger Service Co., Inc.*, a Missouri Court of Appeals case (1971) reported at 466 Southwestern 2d at 150. That case involved an interpretation of the Fair Labor Standards Act. A helper on a refuse truck who worked for an employer engaged exclusively in the collection and disposal of garbage and waste in the City of St. Louis, whether or not he was subject to the Fair Labor Standards provisions regarding minimum wage and overtime, because the employer collected waste from companies engaged in interstate commerce. At page 156 the court said, and I quote, "In the instant case it can scarcely be plausibly argued that the garbage and refuse after being collected by plaintiff entered the channels of interstate commerce, or the mere transportation of such garbage and other refuse for the purpose of disposing of it could be said to be commerce among the several states within the meaning of the Fair Labor Standards Act."

So we have the authority of that case which indicates that the transportation of trash and waste across the state line is not engaging in interstate commerce. On the other hand, there is a case of *U. S. v. Pennsylvania Refuse Removal Association*, at 242 Federal Supplement 794, U. S. District Court case for the Eastern District of Pennsyl-

vania (1965) where the court said at page 799, "Defendants argue at various points in their brief that because trash itself is by definition a worthless commodity, it cannot be the subject of 'trade or commerce' as those terms are used in the Sherman Act. That argument misses the point. Here, the relevant subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the words 'trade or commerce' as used in the Act, the defendant's position has no merit." And on appeal to the U. S. 3rd Circuit Court reported at 357 Federal 2d, 806 (1966), the 3d Circuit Court said at page 808, "From the record we are satisfied that the factual holding of the trial judge that 'the hauling and disposing of refuse was an integral part of the refuse removal business' is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state is a vital element of the one business operation which plainly is a proper subject of interstate commerce."

Then there is a citation of *Hoke v. U. S.*

Then we have the case of *U. S. v. Bishop Processing Company,* U. S. District Court, District of Maryland (1968) 287 Federal Supplement 624, which I think could be analogized to our case. In the Bishop case the question was whether a business or factory that polluted the air and that air pollution, malodorous pollution obviously affected business conditions and property values in the neighboring state when the wind blew the smell and pollutants across the state line. One of the questions that had to be decided was whether the Clean Air Act covered this activity, that is, whether or not movement of the air pollutants across state lines constituted interstate commerce. And the District Court in Maryland decided, at page 629, that it did, saying, "The movement of pollutants across a

state line is proper jurisdictional basis for the provisions of the Act relating to the abatement of interstate air pollution. Such movement of pollutants across state lines constitutes interstate commerce subject to the power granted the Congress by the Constitution to regulate such commerce."

From my analysis of the cases that I have just cited I think that the proper viewpoint to accept is that of the 3d Circuit that the transportation of waste across the state line is a subject of interstate commerce and, therefore, subject to the controls of Congress in accordance with the interstate commerce laws. However, that is not dispositive of the problem. The plaintiff suggested the second point that the Federal Government has pre-empted this field, and when I say this field I mean the field of prohibition of interstate movement of solid waste for either treatment or disposal.

I prefer to decide the problem on the basis of discrimination rather than on the theory of pre-emption because I think the issue is more clearly defined when we consider discrimination. I have already read certain portions of the federal code. I will refer to them again. 42 U. S. C. A. 3254. Let me read this in full. "The secretary shall encourage cooperative activities by the states and local governments in connection with solid waste disposal programs; encourage, where practicable, interstate, interlocal and regional planning for, and the conduct of, interstate, interlocal and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."

In Section 3251 there are five parts to subsection (b) setting forth the purposes of this particular law, all of which talk about assistance, technical advice, training

grants, et cetera. None of which seems to me indicate the type of pre-emption that I feel would be required in order to find the Federal Government has pre-empted this field in the fashion that the plaintiffs suggest and to arrive at the decision the plaintiffs suggest.

So we come to the question of whether or not this statute passed by the Legislature of New Jersey which, as I have already indicated, I find involves material which is the subject of interstate commerce, whether the statute discriminates against interstate commerce to the extent that it should be declared unconstitutional. I immediately concede that I am aware of the cases which hold that there is a strong presumption that the statute is constitutional and the legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. Further, to declare a statute unconstitutional is a judicial power to be delicately exercised, quoting from *Harvey v. Essex County Board of Freeholders*, 30 N. J. 381. The Court in the case of *Supermarket General v. Sills*, 93 N. J. Superior, 326 (Chancery Div. 1966) cites a quotation from the U. S. Supreme Court case of *Head v. New Mexico Board of Examiners* at page 345. The New Jersey Court says, "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. State regulation based on the police power which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."

As Judge Schreiber said in the case of *Hackensack Meadows Development v. Municipal Sanitary Landfill Authority*, a Chancery Division slip opinion dated February 13, 1974, page 12 of that slip opinion, "State regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce."

I am aware of the long line of cases that deal with the transportation of deleterious substances. They are listed in *Baldwin v. Seelig*, 294 U. S. 511 (1934), opinion of Mr. Justice Cardozo, at page 525, 7 Lawyers Ed., 1039, which recites some of the cases which have upheld the statutes regulating the importation of unhealthy cattle, decayed foods. Mr. Justice Cardozo says, "Things such as these are not proper subjects of commerce (and notes) there is no unreasonable interference when they are inspected and excluded."

I think the situation is different in this case before me and I see a relationship between the natural gas cases and this case. Some may say it's a strained reason but the natural gas cases that I refer to are *Pennsylvania v. West Virginia*, 262 U. S. 553, and *West v. Kansas Natural Gas Company*, 221 U. S. 229. Each of those cases, the so-called home state attempted to prevent the exportation of one of its natural resources and the statutes were struck down as unconstitutional in derogation of the free flow of commerce, that it is Congress' prerogative to control and not the state.

If we consider, as I do, that the purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural resources, the land, the availability of the land will be prolonged or extended or used less quickly. I don't see any difference between a state being prevented from prohibiting exportation of natural gas than the state being prevented from prohibiting the importation of something that will in effect use one of the state's natural resources.

Therefore, I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional.

You will prepare an order, Mr. Moore?

MR. MOORE: Yes, sir.

(End)

COURT REPORTERS CERTIFICATION.

I, ANTHONY DI STEFANO, one of the Official Court Reporters of the Superior and County Courts of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken by me in the above entitled matter.

ANTHONY DI STEFANO
Anthony Di Stefano

Dated: March 28, 1974.

[127 *N. J. Super.* 160, 316 A. 2d 711 (Ch. 1974)]

[160]

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION AND STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLAINTIFFS, *v.* MUNICIPAL SANITARY LANDFILL AUTHORITY, A JOINT VENTURE OF WILLIAM A. KEEGAN, INC., RECLAMATION AND IMPROVEMENT CO., PETER ROSELLE & SONS, INC., AND DELAWARE SANITARY CO., DEFENDANTS, AND CITY OF YONKERS, NEW YORK, DEFENDANT-INTERVENOR.

Superior Court of New Jersey
Chancery Division
Decided February 13, 1974.

• • •

[162]

Mr. Mark L. First, Deputy Attorney General, for plaintiffs (*Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Mr. David Samson for defendants (*Messrs. Lieb, Wolff & Samson*, attorneys).

Mr. Eugene J. Fox, of the New York Bar, Corp. Counsel for City of Yonkers, pro hac vice for defendant-intervenor (*Messrs. Schapira, Steiner & Walder*, attorneys).

SCHREIBER, J. S. C. The Hackensack Meadowlands Development Commission (HMDC) and the State of New Jersey, Department of Environmental Protection (DEP),

[163]

seek to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site located within
the Hackensack Meadowlands District any solid wastes originating from or collected outside the territorial limits of New Jersey. Both HMDC and DEP had adopted regulations, effective September 1, 1973 and August 31, 1973, respectively, which prohibited such disposal.

An *ad interim* restraint, consented to by defendant, had been entered pending determination of the request for a permanent injunction. On the return date of the order to show cause defendants answered by challenging the constitutionality of the regulations and the Waste Control Act, *N. J. S. A.* 13:1I-1 *et seq.* The hearing was adjourned to allow plaintiffs time to respond to the challenges. In the meantime the City of Yonkers, New York, whose refuse was being deposited on the MSLA site, moved for and was granted leave to intervene as a party defendant. No testimony was taken at the hearing. The parties relied on affidavits and the transcript of proceedings taken before the Hackensack Meadowlands Commission on June 18, 1973.

MSLA has made a three-fold attack. It contends that (1) the Waste Control Act, regulation *N. J. A. C.* 7:26-1.5 promulgated thereunder, and certain regulations of HMDC, namely, *N. J. A. C.* 19:7-1.1(g) and (h), are invalid, arbitrary and unreasonable; (2) the procedure followed by DEP in promulgating its rule, *N. J. A. C.* 7:26-1.5, violated due process of law, and (3) all the above designated regulations and the Waste Control Act must fall because they violate Article 1, Section 8, paragraph 3 (the Commerce Clause) and Article 4, Section 2 (the Privileges and Immunities Clause), of the U. S. Constitution.

I

The Waste Control Act, *N. J. S. A.* 13:1I-1 to 8, recites that the Legislature found that the disposal of wastes generated or collected outside the State poses a threat to the quality of New Jersey's environment and that the Commissioner of Environmental Protection was empowered to create

[164]

regulations prohibiting the "landfill of solid waste" and the "disposal of liquid wastes" within the State which originated or were collected outside New Jersey. The Commissioner adopted Regulation *N. J. A. C.* 7:26-1.5, effective August 31, 1973, which reads as follows:

> Out of State waste
>
> (a) No person engaged in the collection of solid or liquid wastes shall dispose of any solid or liquid wastes which originated or were collected outside the territorial limits of this State in sanitary landfills in the Hackensack Meadowlands District.
>
> (b) No person owning or operating a sanitary landfill within the Hackensack Meadowlands District shall accept for disposal in such sanitary landfill any solid or liquid wastes which originated or were collected outside the territorial limits of this State.

Defendant contends that there is no basis for the Legislature's findings, that the regulation is invalid in the absence of a showing of a causal relationship between banning out-of-state garbage in New Jersey and a threat to its environment, and that the regulation is overly broad by banning all wastes. The statute and the administrative regulations are presumptively valid. *Harvey v. Essex County Board*

of Freeholders, 30 *N. J.* 381 (1959); *Burton v. Sills,* 53 *N. J.* 86 (1968); *State of Profaci,* 56 *N. J.* 346 (1970). Since one can reasonably and readily conceive of facts which would support the Legislature's findings and the Commissioner's regulations, the onus is on defendant to establish that the Legislature's and Commissioner's actions are arbitrary. *Consolidation Coal Co. v. Kandle,* 105 *N. J. Super.* 104 (App. Div. 1969), aff'd 54 *N. J.* 11 (1969); *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n,* 120 *N. J. Super.* 118 (App. Div. 1972); *Borden's Farm Products Co., Inc. v. Baldwin,* 293 *U. S.* 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934). Defendant's proof consisted of an affidavit of an engineer, Dennis L. Backus, and the transcript of proceedings before the Hackensack Meadowlands Commission held on June 18, 1973 with respect to its proposed regulations. The affidavit asserts that quantities of solid

[165]

wastes are used for construction purposes and that therefore a complete ban on disposal of out-of-state solid wastes is inappropriate. This conclusion does not necessarily follow because no reference is made to the amount of New Jersey refuse which is being used for landfill purposes, the limited amount of area available, and the environmental and public health impacts involved. Further, an affidavit of Lino Pereira, the Principal Environmental Engineer of DEP, asserts that sanitary landfills "present a pollution danger because they do not conserve or recover resources but bury them, and because they severely limit the future use of the land on which they are located." Additionally, he avers that sanitary landfills present a unique fire problem. An affidavit of Bernhard V. Lind, Acting Chief of the Bureau of Solid Waste Management in the DEP, asserts that of the 55,000 tons per week of solid waste being disposed of in the Hackensack Meadowlands District, 10,000 tons originated outside New Jersey and there was an acute shortage of remaining landfill life located there. In view of all the foregoing, it is obvious that MSLA has not met its burden.

The same type of attack has been made upon regulations *N. J. A. C.* 19:7-1.1(g) and (h) of the HMDC. These regulations read as follows:

> 19:7-1.1(g). No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> 19:7-1.1(h). All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission, together with their applications, as provided in Sections 3 and 4 of this subchapter, a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment.

Defendant has made no showing that there was no basis for these regulations. The affidavits of William D. McDowell, Executive Director of HMDC, and George D. Cascino, its

[166]

Chief Engineer, disclosed that three surveys had been made to determine the volume and origin of solid waste disposed of in landfills in the Hackensack Meadowlands District.

The first disclosed that in 1968 some 30,000 tons were entering the District each week, of which 4,000 tons originated outside New Jersey. HMDC study in 1971 revealed that the weekly tonnage was 42,000, of which 5,000 emanated from outside the State. In April 1973 HMDC updated its study. At that time weekly tonnage had increased to 55,000, of which 10,000 came from sources outside of New Jersey. The Commission concluded that the sites had only three years of life remaining and that banning of out-of-state garbage would extend the landfill life some six months.

Under the Hackensack Meadowlands Development Act the Commission must provide disposal facilities for the New Jersey municipalities (totalling 118, according to plaintiffs) which had been utilizing the District. *N. J. S. A.* 13:17-10(a), (b) and (e). The affidavits point out that the Commission needs as much time as possible to develop a viable alternate method of disposal. One cannot reasonably contend that promulgation of the regulations under the totality of these facts and circumstances was arbitrary.

Defendant also argues that the HMDC regulations contravene *N. J. S. A.* 13:17-6(w) and 13:17-10(b) and (e) by failing to provide for disposal facilities for waste equal to levels at the time the statute was passed, which levels included out-of-state waste. *N. J. S. A.* 13:17-6(w) authorizes HMDC "to provide solid waste disposal facilities for the treatment and disposal of solid waste, as hereinafter provided." *N. J. S. A.* 13:17-10 reads:

> (a) Within 6 months of the effective date of this act the commission shall undertake and complete a survey of the district to determine the total amount of solid waste treated and disposed on a daily basis in the district as of the effective date of this act by persons *in this State*.

> (b) The commission is hereby authorized, empowered and directed to guarantee that solid waste disposal facilities sufficient to treat and

[167]

> dispose of the total amount of solid waste determined by its survey shall be available or be provided by the commission.
>
> • • •
>
> (e) The commission, in its discretion, may provide solid waste disposal facilities sufficient to treat and dispose of more than the total amount of solid waste determined by its survey, and may make such facilities available to persons other than those treating and disposing of solid waste in the district as of the effective date of this act. [Emphasis added]

Defendant reads these three sections together as guaranteeing continued use to *all* persons utilizing the disposal facilities in the Meadowlands at the time the act was passed. To interpret the statute in that way, however, one must delete the last three words in subsection (a). The inclusion of those words, "in this State," demonstrates that the Legislature was concerned about waste collected in New Jersey. If it intended to include all waste disposed of in the Meadowlands no matter where its origin, the phrase, "in this State" would not have been inserted, since, obviously, garbage dumped in the Meadowlands is dumped in this State. One must assume in interpreting a statute that the legislators would not insert a redundant or meaningless phrase. The only significance in these words is that the Legislature was interested in providing for disposal of New Jersey garbage—therefore, the remaining subsections, when referring to the "total amount of solid waste determined by

its [the Commission's] survey," are concerned with the total amount of garbage disposed of in the Meadowlands by *persons in this State, i.e.*, the total amount of New Jersey waste dumped in the Meadowlands. This is the only sensible interpretation. The concern of the New Jersey Legislature was to safeguard the area for New Jersey operations—not New York, Pennsylvania, or other jurisdictions. As Justice Jacobs wrote in *J. C. Chap. Prop. Owners', etc., Ass'n v. City Council*, 55 N. J. 86 (1969):

> When all is said and done, the matter of statutory construction here will not justly turn on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation. [at 100]

[168]

To the same effect: *State v. New Jersey National Bank and Trust Co.*, 62 *N. J.* 50 (1972). Defendant's contention that the regulations contravene the enabling statute is unsound for the statute mandates only that the Commission guarantee disposal facilities for New Jersey communities utilizing the landfill sites as of the effective date of the act.

II

Defendant attacks the procedure followed by the DEP in adopting *N. J. A. C.* 7:26-1.5, claiming that the failure to hold a hearing prior to adoption of the rule denied defendants due process. This contention has no merit. Plaintiff DEP caused the proposed regulation to be published in the *New Jersey Register* on July 5, 1973, with the statement that "interested persons may present statements or arguments in writing relevant to the proposed action on or before August 3, 1973." 5 *N. J. R.* 220(c). This notice was consistent with the Administrative Procedure Act, *N. J. S. A.* 52:14B-1, *et seq.*, and complied with *N. J. S. A.* 52:14B-4(a)(2), affording any interested person a reasonable opportunity to be heard. Defendant concedes that the act does not require a formal hearing and that it did not submit a statement or request a hearing. The uncontroverted statement in the affidavit of Mr. Lind is that no written statement or argument was received by DEP from any interested person. Under these circumstances there was no constitutional or statutory requirement that a hearing be held prior to the promulgation of the regulations. *Motyka v. McCorkle*, 58 N. J. 165 (1971).

III

There remains defendant's constitutional challenges. *i.e.*, that the DEP and HMDC regulations set forth above violate Article I, Section 8, paragraph 3 (Commerce Clause) and Article IV, Section 2 (Privileges and Immunities Clauses) of the U. S. Constitution. (Defendant has not

[169]

argued the Waste Control Act is unconstitutional). Defendant has not vigorously advanced its argument with respect to Article IV, Section 2, and it is not necessary to deal with that contention in depth. Suffice it to say there are serious infirmities in that position, such as the fact that it is not applicable to corporations and that it only applies where there is no substantial reason for the discrimination. *Paul v. Virginia*, 8 Wall. 168, 75 *U. S.* 168, 19 L. Ed. 357 (1868); *Hemphill v. Orloff*, 277 *U. S.* 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); *Toomer v. Witsell*, 334 *U. S.* 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Article I, Section 8, provides that "Congress shall have power • • • to regulate commerce • • • among the several States • • •." DEP and HMDC contend that garbage is

not a legitimate subject of trade or commerce and therefore not within the purview of the Commerce Clause. They rely upon a number of cases which recognize the power of a state to forbid the sale or importation of impure foods or such articles as would spread disease and pestilence and would be immediate causes of destruction of or injury to human health and life. A state's prohibition of the interstate transportation of diseased animals has been held not to contravene the Commerce Clause. *Clason v. Indiana,* 306 *U. S.* 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). Similarly, statutes forbidding the importation and sale of adulterated or injurious food or drugs have withstood constitutional attacks. *Crossman v. Lurman,* 192 *U. S.* 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904); *Price v. Illinois,* 238 *U. S.* 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915). In *Sligh v. Kirkwood,* 237 *U. S.* 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915), a Florida statute prohibiting the exportation of fruits which were unfit for human consumption was held valid. All these cases classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as nonmerchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease. The articles in-

[170]

volved had no useful purpose and were *per se* dangerous to health. On the other hand, refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity. In passing, it might be noted that some successful incinerator systems which create waste heat for power generation exist in Germany, the Netherlands, France and Switzerland. In the instant situation there is no prohibition against the transportation of out-of-state garbage in or through New Jersey or the disposal of such refuse in New Jersey landfill sites located in places other than the Hackensack Meadowlands Districts.[1] It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal sites in the Hackensack Meadowlands District so that their life expectancy will be extended from 3 to 3½ years. In any event, the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce.

[171]

It is well established that a state may, in the exercise of its police power, enact legislation, even though it may affect interstate commerce, provided that the Federal Government has not preempted the field. *Gibbons v. Ogden,* 9 Wheat 1, 22 *U. S.* 1, 6 L. Ed. 23 (1824); *Missouri, Kansas & Texas Railway v. Haber,* 169 *U. S.* 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898); *Sligh v. Kirkwood, supra; Yellow Cab*

1. *L.* 1973, *c.* 363, enacted on January 2, 1974, authorizes the Commissoiner of the Department of Environmental Protection to determine when any solid or liquid waste which originated or was collected outside New Jersey may not be brought into the State. He has enacted regulations to that effect. *N. J. A. C.* 7:1-4.2. The effect of that statute and regulations is not before the court, although they may render this decision moot. It is interesting to note that the regulations adopted by the Commissioner except from the prohibition separated waste material intended for recycling or reclamation, municipal solid waste to be processed into reusable secondary materials, including fuel and heat, and "hazardous waste" which is to be treated in a solid waste disposal facility. The new law and regulations are concerned with the public health as well as environmental impact. The Commissioner's definition of "hazardous waste" would appear to fall into category of nonmerchantable material not subject to the Commerce Clause. *N. J. A. C.* 7:1-4.1.

Co. of Camden v. State, 126 *N. J. Super.* 81 (App. Div. 1973), certif. den. 64 *N. J.* 498 (1974).

The Federal Government has not adopted legislation dealing with the use of waste landfill sites. Further, the regulations and statute in question are clearly within the authority of the State's police power to conserve its landfill sites. It as been recognized that the dumping of garbage in a landfill is an unattractive and undesirable use of land and that it creates potential health and fire hazards. In *Shaw v. Byram Tp.*, 86 *N. J. Super.* 598 (App. Div. 1965), Judge (now Justice) Sullivan wrote:

> • • • Garbage or refuse is unsightly, smelly, attracts flies and rodents, and is a potential fire hazard. It is a prime source of disease and contamination. It has been called a necessary evil because it is a by-product of a civilized society. Ordinarily, some provision is made for its collection and disposal by the local government. However, problems of public health and welfare are involved, and no matter how carefully regulated, garbage dumps present some hazard to a community, the degree of hazard being directly related to the amount of garbage dumped. [at 602]

In *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, Judge Lynch approved the Commission's finding that:

> Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property*. Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [120 *N. J. Super.* at 122]

[172]

However, state regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce. In other words, the exercise of the police power may not be predicated on a method directed against interstate commerce. Plaintiffs concede that this is so. This nondiscrimination principle has been expounded in several United States Supreme Court decisions. In *Huron Portland Cement Co. v. Detroit*, 362 *U. S.* 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960), the City of Detroit had passed an ordinance which limited the permissible amount and density of smoke emissions from the boiler stacks of vessels while docked in the city. Huron Portland Cement Co., a Michigan corporation whose ships travelled among several states via the Great Lakes, challenged the code as an unlawful interference with interstate commerce. The court held that the ordinance was a valid exercise of the state's police power since it applied generally to *all* ships and did not discriminate in favor of local industry. Mr. Justice Stewart wrote:

> • • • State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702; Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 [PUR 1920E 18]; Milk Control Bd. v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 68 S. Ct. 358, 92 L. Ed. 455.
>
> • • •

> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designed to better the health and welfare of the community. * * * We conclude that no impermissible burden on commerce has been shown. [at 448, 80 S. Ct. at 818].

In *S. C. Hwy. Dept. v. Barnwell Bros. Inc.*, 303 *U.S.* 177 58 S. Ct. 510, 82 L. Ed. 1522 (1938), Mr. Justice Stone, in upholding a state law which limited the width and load of trucks on state highways, wrote:

[173]

> The commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498, 30 L. Ed. 1189; Caldwell v. North Carolina, 187 U. S. 622, 626, 47 L. Ed. 336. It was to end these practices that the commerce clause was adopted.

In *Guy v. Baltimore*, 100 *U. S.* 434, 25 L. Ed. 743 (1879), a Maryland statute authorized Baltimore to collect wharfage fees from all vessels which docked in city wharves, provided that the material to be loaded or unloaded was not produced in Maryland. The city adopted an ordinance accordingly. The court commented:

> In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States. [at 443]

The court invalidated the ordinance on the ground that:

> * * * no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States more onerous public burdens or taxes than it imposes upon the like products of its own territory. [at 439]

The court also indicated that the wharves were property held for public use by the municipality, which could not "be permitted by discrimination" to impede commercial intercourse. That property held for public use may not be limited on a discriminatory basis has peculiar pertinence here. The New Jersey Legislature has deemed it appropriate to classify op-

[174]

erations of garbage landfill sites as public utilities. *N. J. S. A.* 48:2-13. As such they would appear to be affected with a public interest as much as a municipally owned wharf. It might be noted that the State has expressly pro-

hibited a public utility from directly or indirectly making or giving "any undue or unreasonable preference or advantage to any person, locality or particular description of traffic, or subject any particular person, locality or particular description of traffic to any prejudice or disadvantage." *N. J. S. A.* 48:3-4.

DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious. Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.

Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse. In *Pennsylvania v. West Virginia*, 262 *U. S.* 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923), a West Virginia statute restricted the exportation of natural gas to ensure a sufficient supply for its own citizens. Although the Supreme Court recognized (at 598, 43 S. Ct. at 665) that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of people of the state," the statute had to fall because it interfered with interstate commerce.

Oklahoma enacted a law which prevented a pipeline company from transporting natural gas outside the state. The purpose of the law was to conserve natural gas in the Oklahoma fields for consumption in the state. In declaring the statute violative of the Commerce Clause, the U. S. Supreme

[175]

Court, in *West v. Kansas Natural Gas Co.*, 221 *U. S.* 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), commented:

> • • • The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare,—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United

States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. [at 255, 31 S. Ct. at 571]

The Commissioner of Environmental Protection and the Hackensack Meadowlands Development Commission adopted the regulations in question to expand the life of the landfill sites for garbage collection in the Hackensack Meadowlands District from 3 to 3½ years. To attempt to accomplish that end by discriminating against sources of refuse solely because they originate or are collected outside the State under the circumstances here contravenes Article I, Section 8, Clause 3 of the U. S. Constitution. The regulations are invalid.

[68 *N. J.* 451, 348 A. 2d 505 (1975)]

[451]

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and State of New Jersey Department of Environmental Protection, Plaintiffs-Appellants,

v.

MUNICIPAL SANITARY LANDFILL AUTHORITY et al., Defendants-Respondents,

and

City of Yonkers, New York
Defendant-Intervenor-Respondent
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al., Plaintiffs-Intervenors-Respondents,

v.

STATE of New Jersey et al., Defendants-Appellants.

Supreme Court of New Jersey.
Argued Dec. 2, 1974.
Decided Nov. 18, 1975.

• • •

[455]

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for defendants-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

Mr. Herbert F. Moore argued the cause for plaintiffs-respondents, City of Philadelphia, etc., et al (*Messrs. Jamieson, Walsh, McCardell, Moore and Peskin*, attorneys; *Mr. Moore*, of counsel; *Mr. Arthur Meisel*, on the brief).

Mr. Vincent J. Dotoli argued the cause for plaintiffs-intervenors-respondents, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co., et al.

Mr. David Samson argued the cause for defendants-respondents, Municipal Sanitary Landfill Authority, etc. (*Messrs. Leib, Wolff and Samson*, attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for plaintiffs-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

MOUNTAIN, J.

These proceedings involve the joint review of two separate cases. In one case the judgment was entered pursuant to an opinion rendered in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). In the other, judgment was entered following the rendition of an oral opinion in a suit brought by the City of Philadelphia, together with the owners of several landfill operations in South Jersey, against the State of New Jersey and its Department of Environmental Protection (DEP). The [456] cumulative effect of these two judgments was to render unconstitutional certain sections of the Waste Control Act, N. J. S. A. 13:11-1 *et seq.*, together with regulations promulgated by DEP and by the Hackensack Meadowlands Development Commission (HMDC). The measures declared unconstitutional had as their purpose the exclusion from this State of solid waste originating elsewhere. In each suit the trial court found that the laws and regulations under review violated the Commerce Clause, Article 1, § 8, clause 3, of the United States Constitution.

I

The comprehensive authority and responsibility delegated by the Legislature to the HMDC in the Hackensack Meadowlands Reclamation and Development Act, N. J. S. A. 13:17-1 *et seq.*, includes the power to provide facilities for the treatment and disposal of solid waste. N. J. S. A. 13:17-6(w), 13:17-10. The Waste Control Act, N. J. S. A. 13:1I-1 et seq., as originally enacted, contained a legislative finding "that the quality of New Jersey's environment be being threatened by the treatment and disposal of wastes generated or collected outside the State . . ." N. J. S. A. 13:1I-2. By amendments to this act that became effective early in 1974, the Legislature further found that the whole problem of solid waste disposal was growing increasingly acute and that it continued to be seriously exacerbated by the importation of waste from without the State; it determined to and did forbid that any further such waste be brought into the State.[1] The Waste Control Act also au-

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and dispersal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. [N. J. S. A. 13:1I-9]

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of

thorized and directed [457] the DEP to promulgate rules and regulations "prohibiting . . . the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State." N. J. S. A. 13:1I-4. Both HMDC and DEP promulgated regulations responsive to these legislative enactments, all looking to bar the importation of solid and liquid waste from outside the State.[2]

1. (Cont'd.)
the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act." P. L. 1973, c. 39. [N. J. S. A. 13:1I-10]

2. The pertinent portions of the HMDC regulations, which became effective September 1, 1973, reads as follows:

> (g) No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> (h) All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission [Hackensack Meadowlands Development Commission] . . . a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment. [N. J. A. C. 19:7-1.1]

The regulation of the DEP in its present form became effective February 1, 1974 and reads as follows:

> (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials

[458]

In order to enforce these statutes and rules HMDC and DEP filed a complaint seeking permanently to enjoin Municipal Sanitary Landfill Authority (hereinafter MSLA)[3] from accepting for disposal at its landfill sites any solid waste originating or collected outside of the State's territorial borders.[4] At the same time, with the consent of the defendants, an order to show cause issued with temporary restraints prohibiting MSLA from accepting for disposal out-of-state waste. On the return day of the order to show cause, defendants answered, challenging the constitutionality of both the DEP and HMDC regulations as well as the statutes authorizing their promulgation. Thereafter the City of Yonkers, New York, was granted leave to intervene as a party defendant, as it was

2. (Cont'd.)
and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State. [N. J. A. C. 7:1-4.2]

An earlier DEP regulation was before the trial court in the *Hackensack Meadowlands* case and is set forth in the court's opinion. 127 N. J. Super. at 164, 316 A. 2d 711. It was expressly repealed at the same time that it was superseded by the regulation last above quoted. N. J. A. C. 7:26-1.5.

3. Municipal Sanitary Landfill Authority is a joint venture wholly owned and operated by other named defendants. Its landfill operations are located in the Town of Kearny, within the Hackensack Meadowlands District.

4. Plaintiffs also sought statutory penalties pursuant to N. J. S. A. 13:11-5.

then using an MSLA site to dispose of its municipal refuse. No testimony was taken; the parties relied on affidavits and the transcript of previous [459] proceedings before the Hackensack Meadowlands Commission. In February, 1974, the trial judge filed a written opinion declaring the DEP and HMDC regulations to be in contravention of the Commerce Clause of the United States Constitution and therefore invalid. *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, supra,* 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). Judgment was temporarily stayed and on March 26, the Appellate Division granted plaintiffs' motion for a further stay pending determination of the appeal. Upon application by plaintiffs, this Court granted certification while the appeal was pending unheard in the Appellate Division, R. 2:12-2, 66 N. J. 337 (1974).

In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey, and further seeking temporary and permanent injunctive relief restraining DEP from enforcing the statutory provisions and from adopting or enforcing regulations intended to be in furtherance of the statutory purpose. On March 25, 1974 the trial judge (not the judge who had heard the *Hackensack Meadowlands* case), on cross-motions for summary judgment, rendered an oral opinion declaring that N. J. S. A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Following the filing of a notice of appeal to the Appellate Division, N. J. 102, 335 A. 2d 55 (1974), and the two actions were brought on for argument and disposition before us at the same time.

We thus face an issue of major public importance, namely, whether the regulations and statutes under review, designed to meet a pressing emergency in the life of the State, are of [460] such a nature as to violate the Commerce Clause, Article I, § 8, clause 3, of the United States Constitution.[5]

II

The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached "crisis proportions" due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 N. J. 190, 193, 314 A. 2d 65 (1974). The facts presented in the two cases now before this Court, together with the legislative concern with this problem to which we have alluded above and of which more will be said below, serve to reinforce very strongly our consciousness of this extremely serious situation.

The materials constituting the records on these appeals reveal that since the effective date of the creation of HMDC, July 1, 1968, three surveys have been conducted to determine the volume and origin of the solid waste disposed of in the landfills located within HMD. The first survey, mandated by N. J. S. A. 13:17-10(a), found that in 1968 approximately 30,000 tons of solid waste entered HMD each week, of which about 4,000 tons originated outside of New Jersey. The second survey, con-

5. We do not reach the question of the validity of the regulations and statutes when measured against the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The argument for invalidity was found to be totally without merit in the HMDC case, 127 N. J. Super. at 168-69, 316 A. 2d 711, and has not been briefed before us by the parties in either of the two suits.

ducted in 1971, indicated that the total volume of solid waste disposed of in the District had risen to 42,000 tons per week, 5,000 tons of which originated outside of the State. The latest survey, conducted in 1973, revealed further increases to total weekly deposits of 55,000 tons of [461] solid waste, of which about 10,000 tons came from out of state.[6]

On the basis of the 1973 survey, it was estimated by HMDC that the existing landfill sites within HMD had a useful life of about three years, but that a ban on out-of-state refuse would extend their availability by approximately six months. Since the adoption of the ban on out-of-state dumping, the HMDC revised its estimates of the remaining life of the landfills within the HMD. It was calculated that as of January 1, 1974, sanitary landfills within that area had a total life expectancy of about 38 months if the ban were to be continued, but an availability of only 26 months if the ban were to be lifted. Furthermore, there is little chance of reducing the volume of garbage being dumped in the HMD which originates within the State, for the reason, among others, that the Commission has become obligated by statute, N. J. S. A. 13:17-10, to provide solid waste disposal facilities for over 100 New Jersey municipalities.

State-wide, the picture appears much the same. It was estimated that in 1971 over 40,000 tons of solid waste originating out of state was being buried each week in the 340 sanitary landfills then existing within the State. DEP estimated that in that year 1.5 million tons of solid waste originating outside of the State was buried in New Jersey. DEP has also recently computed the total life of the existing sanitary landfill facilities to be about three years in northern New Jersey and approximately ten years in the

6. It was determined that about 6,700 of the 10,000 tons were being disposed of in the three MSLA sites.

southern part of the State. It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%, with the increase in some specific landfills being as high as 50 to 100%.

Compounding the shortage problem are other extremely important environmental considerations. Many existing land- [462] fills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formely been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

To obtain a more comprehensive picture of the problem now facing this State, we have taken judicial notice of another report, released in 1972, which has further documented the crisis in this area.[7] According to this report, in 1972 almost 95% of New Jersey's solid waste was disposed of in landfills within the State. Further projections indicate that with the existing landfill acreage and the projected rate of dumping, all land that is presently committed to landfill operations will be exhausted by 1982. Also recognized is the strong probability that other environmental considerations may further limit the use for landfill purposes of much of the existing allocated acreage. Moreover, the HMD is singled out as an area where "[a] critical test of creative solid waste management is now taking place . . . ." The report estimated that by the end of 1975, the supply of acreage available for landfill in the

7. State of New Jersey County and Municipal Government Study Commission, Solid Waste: A Coordinated Approach (1972).

Meadowlands would be exhausted, an estimate very similar to those made by the HMDC and noted earlier in this opinion.

We are also aware that very little has yet been done in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem. The scope of federal legislation is thus far quite limited. The Solid Waste Disposal Act, 42 U. S. C. A. § 3251 *et seq.*, originally provided only for "financial and technical [463] assistance and leadership . . ." to develop new methods to reduce the volume of waste and to provide for economical methods of disposal, 42 U. S. C. A. § 3251(a)(6). The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act to provide financial assistance for the construction of solid waste disposal facilities and to furnish technical and financial assistance to promote and develop new methods of resource recovery. See *e.g.*, 42 U. S. C. A. §§ 3251(b)(1), 3254b. Although the Act as it now reads also provides for the encouragement of interstate cooperation to resolve the waste disposal problem, 42 U. S. C. A. §§ 3254, 3254a, nothing has been brought to our attention to indicate that New Jersey has entered into any agreement with her neighboring states of New York and Pennsylvania looking to this end.[8]

At the State level there has been more significant activity. In 1970 the Bureau of Solid Waste Management

8. In 1970, the Tri-State Transportation Commission [Connecticut, New York, and New Jersey] published a report entitled *Managing the Natural Environment—A Regional Plan for Water, Sewage, Air and Refuse*. The Commission, interestingly, foresaw the problem with which we are now faced, in its recognition that an interstate solution to the solid waste problem might be difficult to achieve because of increasing resistance to waste "imports." The Commission, therefore, recommended the continued use of landfill sites wherever possible along with regional development of large, efficient incinerators for the cities and inner suburbs. *Id.* at 32. To date, however, the Commission has been ineffective in bringing about the implementation of any of these suggestions.

of DEP published the *New Jersey State Solid Waste Management Plan*, which, among other proposals, recommended the creation of "Solid Waste Management Districts."[9] The *Solid Waste Management Plan* has been approved by the Federal Environmental Protection Agency as the official State plan for New Jersey.

Before the release of the *New Jersey Plan* in 1970, the Legislature had enacted the "Incinerator Authorities Law," [464] N. J. S. A. 40:66A-1 *et seq.*, delegating to municipalities the authority to provide solid waste collection and disposal facilities on a local basis. Prior thereto, in 1968, the "Solid Waste Management Authorities Law" had been enacted, N. J. S. A. 40:66A-32 *et seq.*, permitting the governing bodies of one or more municipalities to create solid waste management authorities to construct and operate incinerators and other solid waste treatment facilities. 1970, the year DEP released its *New Jersey Plan*, saw three further related enactments by the Legislature. The "Solid Waste Utility Control Act," N. J. S. A. 48:13A-1 *et seq.*, recognizing the need for state-wide control over the solid waste industry, provided that the Board of Public Utility Commissioners assume the duties of "regulating [the] economic aspects of solid waste collection, disposal and utilization service . . . ." N. J. S. A. 48:13A-2. The "County Solid Waste Disposal Financing Law," N. J. S. A. 40:66A-31.1, *et seq.*, took note of the fact that the cost of constructing disposal facilities would be prohibitive for many municipalities, and delegated to counties the authority to purchase or construct such facilities within the county "either alone or jointly with any municipality." N. J. S. A. 40:66A-31.4(1). Finally, the "Solid Waste Management Act," N. J. S. A. 13:1E-1 et seq., provided DEP with the

9. The Plan recommended either a "maximum sanitary landfill strategy" or a "maximum incineration strategy," depending on the availability of sanitary landfill acreage.

authority to "supervise solid waste collection and disposal facilities or operations," and to plan all future facilities having in mind that they should conform to "reasonably contemplated development of comprehensive community or regional solid waste collection and disposal facilities and operations and to any State-wide, regional, county and intercounty plans for solid waste management," N. J. S. A. 13:1E-4. These statutes are in addition to the Hackensack Meadowlands Reclamation and Development Act and the Waste Control Act that are earlier discussed above.

Supplementing these statutory provisions, the HMDC has recently announced blueprints to phase out all dumping [465] in the Meadowlands by 1979. It is currently planning to construct a baling plant to compact waste into solid, nonflammable building blocks that may then be used as the base of a 2,000 acre meadowlands park located upon existing landfill sites. Also projected is a resource-recovery plant.

Assuming that plans such as these formulated by the HMDC are implemented within the proposed time period, it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Increasing the lifespan of the HMDC landfills would also alleviate future pressure on other landfills located throughout the State, to accept waste now handled by HMDC, thereby preventing any acceleration of their depletion and preserving lands in other areas of the State from becoming disposal areas.[10]

10. There is every indication that this was the true reason for the enactment of the amendments to the Waste Control Act. (L. 1973, c. 363). Following the promulgation of the regulations banning out-of-state dumping in HMDC, the out-of-state wastes were

III

It is in the light of these facts and with a full realization of the magnitude of the problem, that we address ourselves to the issue as to whether or not the statutes and regulations under attack must fall because they are found to constitute an impermissible burden upon interstate commerce. In both cases now before us the State preliminarily contends that the question of the significance of the burden should not be reached, as the movement of garbage [466] and refuse, things not of commercial value and harmful to the health and welfare of the citizens of the State, does not in fact constitute interstate commerce within the meaning of the constitutional phrase. Therefore, it is argued, any statutes or regulations prohibiting the importation of these deleterious and valueless substances would not violate the Commerce Clause. The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, through the promulgation of regulations by DEP, has in effects been amended to exclude only that refuse which has no value either for fuel or recycling purposes.

The theory that objects harmful to the general public fall beyond the purview of the Commerce Clause has long been recognized by the United States Supreme Court. Perhaps the best articulation of this doctrine appears in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 S. Ct. 689, 31 L. Ed. 700 (1888):

> • • • Doubtless the States have power to provide by law suitable measures to prevent the introduction into

10. (Cont'd.)
then carried to smaller landfill sites in New Jersey which had been originally designed to serve only neighboring municipalities. Thus, in order to prevent the total depletion of these landfills, a state-wide ban on solid waste imports was enacted.

> the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. [125 U. S. at 489, 8 S. Ct. at 700, 31 L. Ed. at 708]

Accord, Baldwin v. Seelig, 294 U. S. 511, 525, 55 S. Ct. 497, 79 L. Ed. 1032, 1039 (1935); *Sligh v. Kirkwood*, 237 U. S. 52, 59-60, 35 S. Ct. 501 L. Ed. 835, 838 (1915). *See Crossman v. Lurman*, 192 U. S. 189, 196-97, 24 S. Ct. 234, 48 L. Ed. 401, 404 (1904); *Plumley v. Massachusetts*, 155 U. S. 461, 468, 472, 15 S. Ct. 154, 39 L. Ed. 223, 225, [467] 227 (1894). Also pertinent to the proposition that garbage or refuse is not an article of interstate commerce is the decision in *Clason v. Indiana*, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). That case involved the validity of an Indiana statute which required that within 24 hours after the death of certain large animals, the owners should burn or bury the carcasses or deliver them to a disposal plant licensed to do business within the state. Transportation for disposal to points outside the state was prohibited. 306 U. S. at 441, 59 S. Ct. 609, 83 L. Ed. at 860. The Supreme Court, after recognizing that the purpose of the statute was not discriminatory, but rather to promote the health of the people, concluded that no impermissible burden on interstate commerce had been shown to exist or as likely to occur. *Id.* at 444, 59 S. Ct. 609, 83 L. Ed. at 862.

The teaching of these cases seems to be that commodities or substances injurious to the public health are not "articles of commerce" within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.

Nevertheless, refuse or solid waste may have intrinsic value of its own. As the trial judge noted in *Hackensack Meadowlands*, ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity." 127 N. J. Super. at 170, 316 A. 2d at 716. Based on this factor, that court concluded that "the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce." *Id.* We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce [468] is involved, as these regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.

The amendments to the Waste Control Act, N. J. S. A. 13:II-9 and 13:II-10,[11] totally banning the disposal of solid

11. Quoted above in footnote 1.

waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless, as we have pointed out, the DEP regulations, issued in response to this legislation, do except from the ban on out-of-state refuse those types of solid waste which may have a value for recycling or for use as fuel.[12] In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of "merchantable" items or legitimate "articles of trade," as those wastes which can be put to effective use are explicitly excepted from the ban. Any assertion that the Commerce Clause applies here must therefore rest on the proposition that the mere transportation and disposal of valueless waste between states constitutes interstate commerce within the meaning of the constitutional provision.

A short time ago, in *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E. D. Pa. 1965), *aff'd*, 357 F. 2d 806 (3d Cir.), *cert. denied*, 384 U. S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966), the transportation and disposal of refuse was itself specifically found to constitute interstate commerce. That case was a Sherman antitrust action brought against an association of refuse removers in the greater Philadelphia area who collected in Pennsylvania but often dumped in New Jersey. 242 F. [469] Supp. at 796. The District Court found that the government had clearly met its burden of showing that defendants' business was commerce, and was interstate in nature. *Id.* at 796-97. The court emphasized that the real

12. DEP was enjoined by the decision below from enforcing these regulations as well as the relevant sections of the Waste Control Act. These regulations are quoted in footnote 2 above.

subject of "trade or commerce" was not the worthless garbage that was being transported but rather the valuable service of its removal and disposal. *Id.* at 799.

The *Pennsylvania Refuse* case affords an illustration of the part played by the Commerce Clause as justification for bringing a particular business scheme within the reach of a Congressional regulatory enactment. The Sherman Act purports only to prohibit as illegal *certain* combinations in restraint of trade or commerce, namely, those where the trade or commerce is interstate in nature. This is the *affirmative* aspect of the Commerce Clause—to support some exertion of federal control or regulation. Similarly, persons engaged in a disposal business, interstate in nature, have been found to come within the scope of the federal Fair Labor Standards Act. *Schultz v. Instant Handling, Inc.*, 418 F. 2d 1019 (5th Cir. 1969); *Barnett v. A-1 Scavenger Service Co.*, 466 S. W. 2d 150 (Mo. Ct. App. 1971). But we deal here, in the case before us, with what are customarily called the "negative implications" of the Commerce Clause, the extent to which it may be invoked—not to support an exercise of federal regulation—but rather to strike down or restrict state legislation. The Supreme Court has understandably adopted a very sweeping concept of the Commerce Clause in its affirmative application, in order to further the extent of Congressional control. A much more confined notion of the reach of this provision has, however, been manifested, as we shall see, when it has been invoked to prohibit or limit state action.

IV

Assuming for present purposes that the service of transporting and disposing of solid waste in the factual con- [470] text here presented is in fact interstate commerce in the constitutional sense, we next consider the contention that the relevant sections of the Waste Control

Act amount to an improper effort to regulate such commerce snice such control lies within the exclusive cognizance of the federal government. In considering this preemption argument in relation to the cases before us, we note initially that in the *Hackensack Meadowlands* case the trial court determined that in this area of solid waste disposal no such preemption is to be found. 127 N. J. Super. at 171, 316 A. 2d 711.

The need to determine whether, in a particular segment of interstate commerce, a state is precluded from acting because of federal preemption is the direct result of the landmark decision of the United States Supreme Court in *Cooley v. Board of Wardens,* 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851). There the Court for the first time clearly recognized that states have concurrent authority with the federal government to deal with those subjects of interstate commerce which do not necessarily require a national or uniform system of regulation. In a more recent statement appearing in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), Justice Brennan laid down the rule that a state would be precluded from acting only where either the "nature of the subject matter" or an "explicit declaration of congressional design" indicated that state efforts were to be precluded. *See* 373 U. S. at 143-152, 83 S. Ct. 1210, 10 L. Ed. 2d at 257-62.

The problem which arises in most instances where Congress has acted—as is here the case—results from there having been a failure on the part of Congress to make clear whether there was or was not a desire and intent on its part to exercise exclusive control in a particular area. The Supreme Court has recognized that "in the final analysis, there can be no one crystal clear distinctly marked formula," *Hines v. Davidowitz,* 312 U. S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941), resort to which will in

all cases unequivocally reveal Congressional intent. *Benson, The Supreme* [471] *Court and the Commerce Clause,* 1937-1970 at 277-78 (1970).

Fortunately, although Congress has acted in this field through the passage of the Solid Waste Disposal Act of 1965 and its subsequent amendments, it has clearly indicated its intention not to preempt the area. As we have noted earlier, federal legislation has thus far been largely limited to providing "financial and technical assistance and leadership" to develop new methods of disposal and resource recovery and to reduce waste. In the Congressional findings is a pronouncement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U. S. C. A. § 3251(a)(6). We also note that severe budgetary cuts in recent years have reduced federal action even below that originally envisioned in the Solid Waste Disposal Act. For example, the Nixon Administration cut the federal solid waste budget from $30 million in 1973 to a projected $5.8 million for the fiscal year 1974, and sought to restrict the federal role to the control and disposal of hazardous wastes. No further funds were provided for such items as research and development, and technical assistance was substantially curtailed. See Environmental Law Institute, *Federal Environmental Law* 1307-1310 (1974).

It is entirely clear that the case for federal preemption must fail. Congress has encouraged state action; it has not precluded it.

V

In considering whether the statutes and regulations here under scrutiny do or do not constitute an impermissible regulation of interstate commerce, we bear in mind that the Constitution "was framed upon the theory

that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. Seelig, supra,* 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935). Primarily the purpose sought to be served by including the Commerce Clause in the Constitution was to check or eliminate the *economic* discrimination among the states that had been so rampant under the Articles of Confederation. *E.g., Baldwin v. Seelig, supra,* 294 U. S. at 521-23, 55 [472] S. Ct. 497, 79 L. Ed. at 1037-38; *H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 533-35, 69 S. Ct. 657, 93 L. Ed. 865, 871-72 (1949); *Ribble, State and National Power Over Commerce* 3-4 (1937).

Despite this broad grant of power given Congress by the Commerce Clause, innumerable problems have continuously arisen. This is in large part because the states, in the exercise of their police power to protect the health, welfare and safety of their citizens, have passed many laws which often in effect do directly regulate interstate commerce. Thus over the years the United States Supreme Court has been called upon to arbitrate between these competing demands of state and federal power.

The cases before us present such a situation. We have no difficulty in finding, as did the courts below, that extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State. Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw v. Byram Township,* 86 N. J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N. J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> • • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission,* 120 N. J. Super. 118, 122, 293 A. 2d 426, 428 (App. Div. 1972); emphasis in original]

[473]

We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, *Adams v. Shannon,* 7 Cal. App. 2d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, *Ecology and the Police Power,* 16 S. D. L. Rev. 26 (1971).

Thus the underlying issue is whether or not this exercise of residual state power, obviously exerted for legitimate and important purposes, must fail because of the

demands of the Commerce Clause. We do not deem it necessary or useful to retrace in any particular detail the history of the negative implications of the Commerce Clause or the manner in which this body of doctrine has evolved through successive decisions of the Supreme Court. Dicta in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 209, 6 L. Ed. 23 (1824) suggested that the intent of this grant of power to Congress had been to exclude entirely concomitant action on the part of the states. At least, however, since *Cooley v. Board of Wardens, supra*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851), it has been clear that state legislation will not necessarily be deemed unconstitutional simply because it can be shown that it may have some impact upon commerce that is interstate in nature. Over the years the Supreme Court has applied various tests and has adopted differing approaches in its treatment of the problem as to whether particular state legislation [474] does or does not fall within the interdict of this provision.

In 1938, in the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, the Court considered a South Carolina statute that had established size and weight limits for trucks using state highways. The result of enforcing the statute was to exclude many vehicles coming from other states that were engaged in interstate commerce. The Court found that the statute did not violate the Commerce Clause. In commenting upon this case, Professor Engdahl recently observed,

> [T]he court now [in *Barnwell*] formulated better than had been articulated before the test of the negative implications of the commerce clause. In Stone's words, the court is to inquire "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means or regulation chosen are reasonably adopted to the end sought." 303 U. S. at 190 [58 S. Ct. 510]. [*Engdahl, Constitutional Power: Federal and State* (1974) § 11.03, p. 272]

In addressing the first of these criteria—whether the state legislature has acted within its province—at least two subordinate issues demand attention: can it be said that the subject matter of the legislation has been preempted by Congress, and is the enactment a valid and proper exercise of the state's police power. It was probably implicit in *Barnwell*, as it has been explicit in both earlier and later decisions, that state legislation must also meet a third test —whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. Recent commentators have questioned whether this third "weighing" test should be, or will continue to be, applied. *Engdahl, op. cit. supra*, § 11.08, pp. 290-94; *Note*, 45 *Univ. of Col. Law Rev.* 487, 489 (1974). In any event it seems clear that it has not yet been entirely abandoned. *Pike v. Bruce Church*, 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, 178 (1970). *But see Brotherhood of Loco-* [475] *motive Firemen & Enginemen v. Chicago, Rock Island & Pacific R. R.*, 393 U. S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

In the case before us it is evident that the New Jersey Legislature—and the agencies that adopted implementing regulations—were looking to the accomplishment of a wholly legitimate end well within their competence. In seeking to prolong the useful lifespan of landfill areas within the state they were ministering to the needs of public health as well as endeavoring to preserve the environment. As we have indicated, there has very clearly been no federal preemption and the legislation is certainly

an appropriate exercise of the state's police power. *Cf. Oxford Consumer Discount Co. of North Philadelphia v. Stefanelli*, 102 N. J. Super. 549, 567-574, 246 A. 2d 460 (App. Div. 1968), modified, 104 N. J. Super. 512, 250 A. 2d 593 (App. Div. 1969), further modified, 55 N. J. 489, 262 A. 2d 874 (1970). Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. Less than total exclusion of solid waste generated outside New Jersey would have been of no avail. Even the means that have been adopted—apparently the best available—offer no certainty of providing more than much needed time within which to devise by technological effort and ingenuity a satisfactory ultimate solution. Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state.

The further step in the testing process would require us to assay the burden on interstate commerce and to weigh it against [476] the benefit to the state. The burden is slight indeed. There is nothing to indicate that adequate alternatives are not available in both New York and Pennsylvania. The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks. When balanced against the dangers

to public health and to the environment that this legislation seeks to avert, these relatively small costs and modest inconveniences seem minor indeed.

Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Commission*, 15 Or. App. 618, 517 P. 2d 691 (1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago*, 509 F. 2d 69 (7th Cir. 1974), *cert. denied* 421 U. S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), appeal dismissed, 414 U. S. 1035, 94 S. Ct. 532, 38 L. Ed. 2d 326 (1973) (prevention and control of marine oil spillage); *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F. 2d 897 (9th Cir. 1975) (ban on further building).[13]

We know that not every hindrance to interstate commerce that may result from a state law will be deemed sufficient to invalidate the legislation. We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have [477] become so endangered upon this "plundered planet," insistently demand every reasonable protection that can possibly be recruited.

In this area the state has not only a right to protect its own resources, but also the duty to do so, in the interest of its citizens, as well as others. We are not here concerned with the problem presented in such cases as *West v.*

13. A similar legislative ban on the importation of waste materials has been enacted in the State of Maine. See *Maine Rev. Stat. Ann. Title* 17, § 2253 (Supp. 1974-75).

Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). There the Court was called upon to review state statutes restricting the flow of natural gas to citizens of the state in question. Quite understandably it was found that the enactments did violence to the Commerce Clause. In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic. We know that there resides in each of the several states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty. In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907), the Supreme Court entertained an original action by the State of Georgia, in which the latter sought to restrain an out-of-state manufacturer from permitting deleterious fumes to be blown into the plaintiff state and do damage to trees, fields and crops. In determining that an injunction would issue, practically as of right, Justice Holmes said,

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. [478] It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. [206 U. S. at 237, 27 S. Ct. at 619, 51 L. Ed. at 1044]

It is true that there the Court dealt with a nuisance, which is not present here. Yet, the case has relevant import. The protection to its environment and natural resources that a state can demand of right from a federal court should be equally available to it by way of protective legislation. We do not mean to be understood as saying that every assertion of a state's quasi-sovereign right to protect its environment, ecological values and natural and human resources will be sustained regardless of the impact upon interestate commerce. Clearly this is not so. But where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action.

The judgments of the respective trial courts are hereby reversed; all stays or injunctive orders are vacated.

For affirmance in both cases: Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—6.

For reversal: None.

Supreme Court of the United States

No. 75-1150

City of Philadelphia et al., Appellants, v. State of New Jersey et al. — On Appeal from the Supreme Court of New Jersey.

[February 23, 1977]

PER CURIAM.

This suit challenges the constitutionality of a New Jersey statute prohibiting any person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the State," except garbage to be fed to swine. New Jersey Pub. L. 1973, c. 363. The New Jersey Supreme Court held that the act was not pre-empted by a federal statute addressing questions of waste disposal, the Solid Waste Disposal Act of 1965, 42 U. S. C. § 3251 *et seq.*, and was not unconstitutional as discriminatory against or placing an undue burden on interstate commerce. *City of Philadelphia et al. v. State of New Jersey et al.*, 68 N. J. 451 (1975). We noted probable jurisdiction on April 5, 1976, 425 U. S. 910 (1976).

On October 21, 1976, the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. §6901 *et seq.* became law. The parties at the Court's request supplemented their briefs to address the question of the impact of the new federal statute on the New Jersey Act. Appellants argue that the Act displaces the New Jersey law, and appellees argue that it does not pre-empt or in any way undercut the validity of the New Jersey legislation. While

federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute. The judgment of the New Jersey Supreme Court is therefore vacated and the case remanded for reconsideration in the light of the Resource Conservation and Recovery Act of 1976.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. § 6901 *et seq.* evidences a federal concern with the growing problem of waste disposal in this country. This complex statute attempts to deal with this problem in a variety of ways. Because the impact of the statute will depend in part on the regulations promulgated under it, generalizations at this time as to the effect of the statute should be made with caution. But I do think it is abundantly clear from the text of the statute and from its legislative history that Congress did not intend to pre-empt state laws such as the one at issue here. In its report on the statute the House Committee on Interstate and Foreign Commerce recognized the existence of state laws simi-

lar to this New Jersey law. H. R. Rep. No. 94-1491, 94th Cong., 2d Sess., 3, 10. The report explicitly disclaimed any pre-emptive intention.

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.*, at 33.

In view of this express disclaimer, I do not understand how the Court can assume that pre-emption remains an open question.

We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty.

SUPREME COURT OF NEW JERSEY
A-82 September Term 1974

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DE LORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants-Appellants.

Argued May 10, 1977. Decided June 20, 1977

On Remand from the Supreme Court of the United States.

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman* of counsel and on the brief; *Mr. Peter Herzberg* and *Mr. Nathan M. Edelstein*, Deputy Attorneys General, on the brief).
Mr. Herbert F. Moore argued the cause for respondents (*Messrs. Jamieson, McCardell, Moore, Peskin and Spicer*, attorneys; *Mr. Moore* of counsel; *Mr. Meisel*, on the brief).

The opinion of the Court was delivered by
MOUNTAIN, J.

On November 18, 1975, this Court rendered its decision in *Hackensack Meadowlands v. Municipal Landfill Authority,* 68 *N. J.* 451. The opinion upheld the constitutionality of *L.* 1973, *c.* 39, as supplemented by *L.* 1973, *c.* 363, known as the Waste Control Act, *N. J. S. A.* 13-1I-1 *et seq.* The principal purpose of this statute is to prohibit the disposal within New Jersey of waste originating out of state.

Plaintiffs appealed to the Supreme Court of the United States, where probable jurisdiction was noted April 5, 1976, 425 *U. S.* 910, 47 *L. Ed.* 2d 760, *sub nom. City of Philadelphia v. State of New Jersey.* During the course of oral argument before the Supreme Court on November 3, 1976, it was brought to the attention of that Court that twelve days prior thereto the President had signed into law the Resource Conservation and Recovery Act of 1976, *Pub. L.* 94-580, 42 *U. S. C. A.* § 6901, *et seq.* This statute expands the federal role with respect to the disposal of solid wastes. In compliance with an order dated November 15, 1976, the parties filed supplemental briefs in the Supreme Court addressed to the issue as to the effect this act might have upon the constitutionality of the New Jersey legislation. On February 2 1977 the Supreme Court, with four justices dissenting, issued a *per curiam* opinion vacating the judgment of this Court entered November 18, 1975 and remanding the case for reconsideration in light of the foregoing Congressional enactment. *City of Philadelphia v. State of New Jersey,* — U. S. —, 51 *L. Ed.* 2d 224. More specifically the opinion formulated the issue for determination on remand in these words,

> We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute.
>
> [— *U. S.* at —, 51 *L. Ed.* 2d at 226]

We have carefully examined the Congressional enactment as well as the materials bearing upon its history, and have had the benefit of briefs and argument of counsel addressed to the issue so presented. In our opinion, for the reasons set forth below, we believe the Congressional enactment does not effect federal pre-emption either as to the disposal of hazardous waste or with respect to any other area of solid waste disposal. In order that the basis for our conclusion may be fully comprehended we proceed to examine the two major subchapters of the federal act. Even though hazardous waste disposal is not clearly at issue in this case, we deem it appropriate to consider initially the subchapter of the Act which addresses that problem.

I

Subchapter III of the Act (42 *U. S. C. A.* §§ 6921-6931) is entitled, "Hazardous Waste Management." In this portion of the statute there is set forth a comprehensive program for the disposal of hazardous waste. The latter is defined as,

> . . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed

of, or otherwise managed. [42 *U. S. C. A.* § 6903(5)] [1]

It seems clear that it would include nuclear waste.

The Administrator of the Environmental Protection Agency is directed to ". . . develop and promulgate criteria for identifying the characteristics of hazardous waste . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 *U. S. C. A.* § 6921(a). Based upon such study, particular hazardous wastes are to be identified, the list to be revised from time to time as may be appropriate. *Id.*

The sections of the statute immediately following very carefully set forth detailed standards to be applied to (1) generators of hazardous waste (42 *U. S. C. A.* § 6922); (2) transporters of hazardous waste (42 *U. S. C. A.* § 6923); and (3) owners and operators of hazardous waste treatment, storage, and disposal facilities (42 *U. S. C. A.* § 6924). This hazardous waste program is not an exclusively federal venture. Individual states are authorized to develop their own hazardous waste control and disposal programs subject to the approval of the Administrator. 42 *U. S. C. A.* § 6926(b). Significantly, under a section entitled "Retention of State Authority," the states are prevented from imposing hazardous waste requirements less stringent than those authorized by the federal guidelines (42 *U. S. C. A.* § 6929). If a state-enacted program deviates from the federal mandates the Administrator has the power to withdraw federal approval (42 *U. S. C. A.* § 6926(e)).

1. *N. J. S. A.* 13:1I-3(c) contains a definition of "solid waste" expansive enough to exclude from disposal in New Jersey "hazardous waste" as that term is defined in the federal act.

This Subchapter may fairly be characterized as an effort to achieve a degree of uniformity in hazardous waste control. The federal guidelines pertaining to parties involved in the generation, transportation and disposal of such waste establish a minimum national standard below which a state hazardous waste program may not operate. However, the Act does not prevent the State from imposing more stringent standards to hazardous waste operations within its borders. New Jersey has done just this through the enactment of *N. J. S. A.* 13:1I-1 *et seq.*

We view this ban on disposal of waste originating out-of-state as entirely consistent with the federal program. That the federal hazardous waste guidelines and the New Jersey prohibition of out-of-state waste can function smoothly together is illustrated by using a hypothetical New Jersey hazardous waste disposal plant as an example. Once the federal regulations establishing performance standards are promulgated,[2] this plant will be required to comply with announced guidelines pertaining to record-keeping, reporting systems, plant design and training of personnel (42 *U. S. C. A.* § 6924(1)-(7)). The sole state restriction imposed upon the operation of the plant will be the ban on the receipt of hazardous waste which originated outside of New Jersey. *N. J. S. A.* 13:1I-10. It is readily apparent that both the federal and state regulations operate without conflict. The New Jersey plant will be in strict compliance with all federal requisites even though out-of-state wastes are prohibited.

The critical inquiry relevant to federal pre-emption is "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of

2. It should be noted that as of this date no federal regulations have been promulgated. It is clearly established that potential federal regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Welch Co. v. New Hampshire*, 306 U. S. 79, 84-85, 83 L. Ed. 500, 504-505 (1939).

the field. . . ." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 *U. S.* 132, 142, 10 *L. Ed.* 2d 248, 256-57 (1963). Having concluded that "federal superintendence" of the field of hazardous waste is indeed unimpaired we perceive no federal pre-emption resulting from Subchapter III.

II

Subchapter IV of the Congressional enactment (42 *U. S. C. A.* §§ 6941--6949) is entitled "State or Regional Solid Waste Plans." This portion of the Act deals with the treatment and disposal of *non-hazardous* solid wastes, materials that are or may become "environmentally sound," 42 *U. S. C. A.* § 6941, and that may either be reclaimed or disposed of with a minimum of danger to human life and health. It is with wastes of this sort that we are here directly concerned.

As to the disposal of solid waste of a non-hazardous nature, it also seems clear that there has been no federal pre-emption by virtue of this statute. On the contrary, as will be seen, the Act affirmatively encourages state action and expressly eschews any intent on the part of Congress to do more than offer guidance together with technological and fiscal support.

It is well-settled today that pre-emption deriving from federal legislation must take the form of "an unambiguous Congressional mandate." *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, 373 *U. S.* at 147, 10 *L. Ed.* 2d at 259 (1963). Where no such mandate is discernible, there will be no pre-emption. The Supreme Court appears to have been especially reluctant to find an intent to pre-empt where state legislation has been enacted to serve local environmental interests, *Askew v. American Waterways Operators*, 411 U. S. 325, 36 *L. Ed.* 2d 280 (1973), or to protect public health. *Huron Portland Cement Co. v.*

Detroit, 362 *U. S.* 440, 4 *L. Ed.* 2d 852 (1960). Our state statute, as was made clear in this Court's earlier opinion, 68 *N. J.* at 472-73, is an exercise of the police power of this State enacted in the interest of protecting the environment of New Jersey and the welfare of its citizens, *i.e.*, the public health.

The intent of Congress to leave this power with the several states, insofar as the disposal of non-hazardous waste is concerned, is clearly manifest. The report on these statutory provisions of the House Committee on Interstate and Foreign Commerce, *H. R. Rep.* No. 94-1491, 94th *Cong.* 2d Sess. is explicit.

> The Federal guidelines published pursuant to Title IV are not mandatory upon the states . . . .
>
> [*Id.* at 5]

> It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.
>
> [*Id.* at 33]

> [T]he provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*Id.*]

Senator Randolph, a co-sponsor of the bill, had this to say,

> In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.

This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.

Guidelines should provide the States and area planning agencies with maximum flexibility, while assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.

To assure that the federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request.

[122 *Cong. Rec.* 11069 (1976)]

The statute itself (Subchapter IV) is a blueprint for state action to be accompanied by federal guidance and assistance. First there are set forth the objectives of Subchapter IV:

The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. [42 *U. S. C. A.* § 6941]

The Congressional plan for the attainment of these objectives follows. The federal Administrator of the Environmental Protection Agency is directed to "publish guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services." 42 *U. S. C. A.* § 6942(a). At a later date, probably some time in 1978, the Administrator is to issue further guidelines, these "to assist in the development and implementation of State solid waste management plans." 42 *U. S. C. A.* § 6942(b).

The State plan is seen as the operational vehicle by and through which the statutory objectives are to be accomplished. Minimum requirements for federal approval of any such plan are set forth. 42 *U. S. C. A.* 6943. Disposal must be by sanitary landfill; open dumps are no longer to be permitted. 42 *U. S. C. A.* §§ 6944-45. Within an allotted span of time the Governor of each state, acting in concert with elected local official and aided by the guidelines promulgated at the federal level, is to identify regions within the state as being appropriate areas within which to carry out programs of solid waste management and disposal. 42 *U. S. C. A.* 6946. Provision is made

for interstate regions where this is suggested by the federal guidelines and approved by representatives of the respective states. *Id.* Upon approval of a State plan by the Administrator of the Environmental Protection Agency, the State becomes entitled to apply for and receive federal financial assistance. 42 *U. S. C. A.* 6947.

The position of the plaintiffs before this Court on remand from the Supreme Court is stated in their brief as follows:

> Plaintiffs do not urge that *P. L.* 1973, *c.* 363 has been preempted under the Commerce Clause. They do, however, submit that said statute must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 *U. S.* 52, 67 (1940).
>
> [*Plaintiffs' Brief*, p. 4]

They argue further that if a region lying partially within each of two or more states is identified by the federal Administrator of Environmental Protection as an appropriate unit for planning regional solid waste management services under 42 *U. S. C. A.* § 6942(a), then the respective Governors of the states in question are *required* by the federal statute to agree upon and fix the precise boundaries of the region and to develop a plan of solid waste disposal for the area so laid out. The argument concludes by asserting that the Governors and other involved state officials have no discretion in the matter, that Congress has mandated that the action be taken.

We have no hesitancy in rejecting this contention. The statute (Subchapter IV) cannot be so read. We need not address the underlying difficulties that such a construction would pose, since we are satisfied that as a matter of statutory construction, Congress intended to leave to each state the decision as to whether it will or will not accept recommendations set forth in federal guidelines and adopt, or not adopt, a State plan qualifying for federal approval. The only sanction deriving from the statute, in the event of non-compliance, is an ineligibility to receive federal funds and perhaps technological aid. As the House Report explains,

> If those [statutory] objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*House Report, supra*, at 33]

The Federal guidelines published pursuant to Title IV are not mandatory upon the states.

[*Id.* at 5]

Furthermore *L.* 1973, *c.* 363, forbidding the disposal within New Jersey of solid and liquid wastes originating elsewhere, is not presently in conflict with any federal proposal or guideline, since none has been made or promulgated. When federal guidelines as to proposed regions are in fact published, they may not even suggest or recommend that any part of New Jersey be joined with the City of Philadelphia in a common region. On the other hand, if such a suggestion or recommendation were to be made the Governor of Pennsylvania or the Governor of New Jersey may fail to approve it. Finally, should such a proposal be made and approved by both states, this statute need not frustrate fulfillment of the proposal. The New Jersey Commissioner of Environmental Protection could simply exercise his statutory authority to decide that under

such circumstances the introduction of out-of-state waste could be ". . . permitted without endangering the public health, safety and welfare. . . ." *N. J. S. A.* 13:1I-10.

In brief recapitulation, it is our conclusion that the Resource Conservation and Recovery Act of 1976 does not pre-empt the control and management of hazardous solid waste disposal. Parenthetically, we note again that this case is not directly concerned with the disposal of hazardous waste, nor do plaintiffs contend otherwise. It is our further conclusion that in no other field or area of waste disposal does the act effect any federal pre-emption. In fact it gives strong encouragement to the several states to take positive action on their own, supported by federal assistance and direction in the form of funds, technological aid and guidelines. We reject plaintiffs' argument based upon the Supremacy Clause, since we interpret Subchapter IV of the statute as offering incentives for desired action, but mandating nothing. The New Jersey statute is in conflict with no federal regulation or proposal, since none exists. Should federal guidelines be promulgated the statute presents no barrier against compliance nor to achieving effective interstate or regional cooperation.

After the remand from the Supreme Court of the United States, the Attorney-General filed a motion with this Court seeking, inter alia, the authority immediately to enforce *L.* 1973, *c.* 363. Originally, by order of December 11, 1975, we vacated a previous stay of judgment and authorized the immediate implementation of the statute in accordance with our decision of November 18, 1975. By order dated April 4, 1977, we reserved decision on the pending motion for a stay and directed that counsel address themselves to the issue so presented at the same time the meritorious issue posed on remand was argued. This was done. Plaintiffs resist the Attorney-General's application, urging that the *status quo* be maintained pending

their prospective application for further relief to the Supreme Court of the United States. The reasons which motivated us to deny plaintiffs' application for a stay of judgment following the rendition of our decision in November, 1975, are as compelling today as they were then. Additionally, we note that meanwhile a period of 18 months has elapsed.

The motion of the Attorney-General is granted to permit the prompt enforcement of *L.* 1973, *c.* 363 in accordance with our earlier decision, to take effect, however, only after the expiration of 30 days from the date of this opinion which we consider a reasonable period of time to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment, should they determine to do so.

In conclusion, we reaffirm the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above.

Chapter 363 Laws of N. J. 1973
Approved January 2, 1974.

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 12, 1973

By Senators WALLWORK, HAGEDORN and HIRKALA

(Without Reference)

AN ACT to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

2. No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, °*except garbage to be fed to swine in the State of New Jersey,*° until the commissioner

shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

3. This act shall take effect on the first day of the first month following its enactment.

ADMINISTRATIVE ORDER NUMBER FORTY.

(Adoption of Emergency Rule.)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
RICHARD J. SULLIVAN, COMMISSIONER
TRENTON

WHEREAS, Governor T. Cahill, on January 2, 1974, did sign into law Chapter 363 of the Public Laws of 1973, an Act prohibiting the importation into New Jersey of solid and liquid wastes generated outside the the State, effective February 1, 1974; and

WHEREAS, that Act permits the Commissioner of the Department of Environmental Protection to promulgate regulations permitting and regulating the treatment and disposal of out of state wastes upon determining that such action can be permitted without endangering the public health, safety and welfare; and

WHEREAS, the President of the United States and Governor William T. Cahill have recognized and declared that a critical shortage of fuel exists throughout New Jersey and the Nation; and

WHEREAS, there is substantial evidence that the manufacture of reusable materials from recycled solid waste consumes less energy than the manufacture of those same materials from virgin materials; and

WHEREAS, viable processes exist for the production of useful and necessary energy and energy producing fuels from municipal solid waste; and

WHEREAS, the recycling and recovery of secondary materials from solid waste conserve and protect many valuable and diminishing natural resources; and

WHEREAS, New Jersey is one of the nation's leading producers of chemicals and petrochemicals and, therefore, produces substantial quantities of diverse hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes; and

WHEREAS, in order to preserve and protect the quality of New Jersey's environment, the Department of Environmental Protection has proposed rules which would prohibit the disposal of such hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes at conventional sanitary landfills within the State; and

WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

WHEREAS, it is apparent that the economic survival of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; and

WHEREAS, the imminent ban upon the importation into this State of wastes intended for resource recovery and recycling facilities, and of those hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities presents both an immediate and long-term peril to public health, safety and welfare.

NOW THEREFORE, under the powers and duties conferred upon me by the New Jersey Administrative Procedure Act, N. J. S. A. 52:14B-4(c) and N. J. A. C. 15:15-4.18 et seq. which empowers the Commissioner of the Department of Environmental Protection to adopt, amend

or repeal an administrative rule whenever the Commissioner determines that an imminent peril to public health, safety and welfare exists, I do hereby adopt the following rules:

N. J. A. C. 7:14 IMPORTATION OF SOLID AND LIQUID WASTE FROM OUTSIDE NEW JERSEY.

N. J. A. C. 7:1-4-1 *Definitions.*

"Bulk Liquid" or "Bulk Semi-Liquid" means liquid or semi-liquid in the quantity of fifty-five (55) gallons or more.

"Chemical Waste" means discarded material-resulting from any manufacturing process or other procedure which is or can become chemically active.

"Department" means the Department of Environmental Protection.

"Hazardous Waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms, because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause detrimental cumulative effects. They shall include waste materials that are (1) toxic or poisonous; (2) corrosive; (3) irritating or sensitizing; (4) radioactive; (5) biologically infectious; (6) explosive; (7) flammable; and present a significant hazard to human health and/or the environment. They include, but are not limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 9-596) and those listed in Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

"Liquid Waste" means any waste which exists in the liquid state at standard conditions (70 F and 29.92 in Hg.).

"Pesticide" means any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing or mitigating any insects, rodents, nemotodes, predatory animals, fungi, weeds and other forms of plant or animal life or viruses, except viruses on or in living man or other animals. The term "pesticide" shall also include any substance or mixture of substances labeled, designed or intended for use as a defoliant, desicant or plant regulator.

"Recycling or Reclamation Facility" means any place, equipment, or plant designed and operated to collect, store, or process and to redistribute separated materials so as to return the material to the raw materials market.

"Resource Recovery Facility" means any place, equipment, or plant designed and operated to separate or process municipal solid waste into usable secondary materials, including fuel and heat.

"Secondary Material" means previously used raw material.

"Semi-Liquid" means solid matter in a liquid media (e.g., a slurry).

"Solid Waste" means garbage refuse, sludge, and other discarded solid materials resulting from industrial, commercial, and agriculture operations and from community activities, and all other waste materials including liquids disposed of incident thereto except solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

N. J. A. C. 7:1-4.2 *Out-Of-State Waste.*

No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:

(a) Garbage to be fed to swine in the State of New Jersey;

(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste and that is intended for a recycling or reclamation facility;

(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recoverd in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N. J. A. C. 7:1-4.3 *Effective Date.*

These rules shall take effect on February 1, 1974.

THE FOREGOING IS HEREBY ADOPTED AND EFFECTIVE THIS ——— DAY OF JANUARY, 1974.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

By: RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

Filed January 22, 1974.

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Attorneys for Plaintiffs.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
DOCKET NO. L 15068.73 P. W.
Civil Action

CITY OF PHILADELPHIA, a municipal corporation of the Commonwealth of Pennsylvania, CITY OF GLEN COVE, a municipal corporation of the State of New York, LANDFILL AND DEVELOPMENT COMPANY, a New Jersey corporation, MAC SANITARY LANDFILL, INC., a New Jersey Corporation, KINSLEY'S LANDFILL, INC., a New Jersey corporation, and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a New Jersey Corporation,
Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants.

COMPLAINT
IN LIEU OF PREROGATIVE WRITS.

Plaintiffs, City of Philadelphia, c/o David J. Damiano, Commissioner, Department of Streets, 340 Municipal Services Building, Philadelphia, Pennsylvania, 19107, City of Glen Cove, c/o David Quient, Esq., City Attorney, 5 Highland Road, Glen Cove, New York, 11542, Landfill and Development Company, Route 38, R. D. #1, Mt. Holly, New Jersey, M. A. C. Landfill, Inc., Routes 41 and Clements Bridge Road, Deptford, New Jersey, Kinsley's Landfill, Inc., Routes 41 and 47, Deptford, New Jersey and DeLorenzo-Interstate Waste Removal Co., Inc., 208 Paterson Avenue, Trenton, New Jersey, in complaining against defendants, say:

COUNT I.

1. Plaintiff landfills are public utilities of the State of New Jersey and hold duly issued temporary certificates of public convenience and necessity issued by the New Jersey Public Utility Commission.

2. Each said landfill duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a sanitary landfill registration certificate pursuant to N. J. A. C. 7:26-2.2 &c.

3. Plaintiff Landfill and Development Company operates a sanitary landfill on a tract of land consisting of approximately 200 acres situated in the Townships of Mount Holly, Eastampton and Lumberton in the County of Burlington and State of New Jersey, which landfill site has been leased from plaintiff DeLorenzo-Interstate Waste Removal Co., Inc.

4. Plaintiff M. A. C. Landfill, Inc. operates a sanitary landfill on a tract of land consisting of approximately 87 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

5. Plaintiff, Kinsley's Landfill, Inc., operates a sanitary landfill on a tract of land consisting of approximately 380 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

6. Each landfill treats and disposes of solid waste which originated or was collected outside the State of New Jersey, including considerable solid waste collected in the City of Philadelphia, Pennsylvania.

7. Plaintiff City of Philadelphia has entered into a written agreement with each of the aforesaid plaintiff landfills for the treatment and disposal of a substantial portion of its solid waste. Plaintiff City of Glen Cove disposes of a substantial portion of the solid waste originating or collected in said city in sanitary landfills located in the State of New Jersey.

8. By virtue of the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 *et seq.*, the Department of Environmental Protection of the State of New Jersey was granted the power and authority to promulgate rules and regulations governing solid waste disposal in the State of New Jersey.

9. On February 21, 1973, the Governor of the State of New Jersey approved A. 1132 (P. L. 1973, c. 39) known as the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

10. Said Act, which became effective March 1, 1973, is entitled as follows:

> AN ACT to control and regulate the treatment and disposal within this State of solid and liquid waste collected outside the State, empowering the Commissioner of Environmental Protection to adopt rules and regulations and prescribing penalties for violations.

11. Pursuant to paragraph 4 of the Waste Control Act, the Commissioner of Environmental Protection is granted the power to prohibit "the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State". N. J. S. A. 13:1I-4a.

12. In accordance with the authority conferred by N. J. S. A. 13:1E-1 *et seq.* and N. J. S. A. 13:1I-1 *et seq.*, and as part of a proposed Revision to the Rules of the Bureau of Solid Waste Management, the Commissioner of Environmental Protection proposed as follows:

7:26-1.8 *Out of State Waste*

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

13. The effect of the aforesaid portion of the proposed rule is to completely prohibit the disposal in the State of New Jersey of any solid waste which originated or was collected outside the territorial limits of the State.

14. The principal basis and background advanced by the Department of Environmental Protection to support the proposed prohibition was to assure the availability of landfill acres in New Jersey for solid waste generated in this State, and as an incident thereto, to stabilize the cost of solid waste collection and disposal for New Jersey residents.

15. The power and authority to regulate the rates and public utility aspects of the solid waste collection and disposal industry has been conferred upon the Board of Public Utility Commissioners pursuant to the Solid Waste Utility Control Act of 1970, N. J. S. A. 48:13A-1 *et seq.*

16. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and an unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

17. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State; and there is no difference with respect to the treatment or disposal of same.

18. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 hereof, if adopted and enforced, would be and constitute an undue burden upon interstate commerce in violation of Art. 1, Sec. 8., Cl. 3 of the United States Constitution.

19. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

20. Plaintiffs will suffer immediate and irreparable injury, loss or damage if the proposed rule prohibiting the importation of out-of-state waste set forth in paragraph 12 hereof is adopted and enforced.

21. In the event plaintiff landfills are prohibited to dispose of solid waste which originated or was collected outside the territorial limits of this State, the continued operation of said sanitary landfills may be and become economically unfeasible, thereby impairing the public interest.

22. Plaintiffs must obtain equitable relief because they do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT II.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out of state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT III.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on the face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and

successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT V.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 4, Sec. 7, Par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayer for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C.-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an arbitrary, capricious and unreasonable exercise of power by an administrative agency, thereby denying plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive of the First Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. The New Jersey Legislature has conferred sweeping authority upon appropriate public bodies to regulate the treatment and disposal of solid waste in New Jersey, for the purpose of assuring a sanitary method of disposing of solid waste and thereby protecting the public health, safety and welfare.

3. N. J. S. A. 26:1A7 provides, in part, that the Public Health Council, established within the Department of Health of the State of New Jersey, shall have power to establish reasonable sanitary regulations, and that the body of regulations so established shall be called the State Sanitary Code.

4. By virtue of said authority and in accordance with the applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, a revision of Chapter VIII of the State Sanitary Code, exclusively concerned with refuse disposal, was adopted by the Public Health Council to become effective July 1, 1970.

5. Section 6 of the Solid Waste Management Act (1970) N. J. S. A. 13:1E-6b provides, in pertinent part, as follows: "All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department (of environmental protection), subject to its power as herein provided to amend or repeal the same."

6. By virtue of the authority granted by the applicable provisions of the Solid Waste Management Act (1970), (N. J. S. A. 13:1E-1 *et seq.*) and the Waste Control Act (N. J. S. A. 13:1I-1 *et seq.*) and in accordance with applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, the Department of Environmental Protection held hearings in two parts during December, 1973 on proposed solid waste management regulations.

7. Said proposed regulations do not expressly amend or repeal Chapter VIII of the State Sanitary Code.

8. In addition to the aforesaid, N. J. S. A. 13:1E-17, being a supplement to the Solid Waste Management Act (1970) provides, in pertinent part, as follows: "No ordinances or regulations of any governing body of a municipality or county or board of health more stringent than this act or any rules or regulations promulgated pursuant hereto, and relating to health and environmental protection aspects of solid waste collection or solid waste disposal, shall be superseded by this act."

9. A similar provision with respect to the provisions of the State Sanitary Code was enacted in 1947, N. J. S. A. 26:1A-9.

10. On January 2, 1974, the Governor of the State of New Jersey approved S. 2367 (P. L. 1973, c. 363) being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

11. Said Act, which will become effective February 1, 1974, is entitled as follows:

> An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

12. The text of said Act provides as follows:

> (1) The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> (2) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations

> permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973. c. 39.

13. In enacting a law prohibiting the importation of out-of-state waste, the principal concern of the New Jersey Legislature was to preserve landfill acres in New Jersey for solid waste generated in this State.

14. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within this State; and there is no difference with respect to the treatment or disposal of same.

15. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and the unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

16. Inasmuch as the disposal of solid waste is a problem of national scope and concern, the Congress of the United States has directed the Secretary of Health, Education and Welfare to encourage interstate and interlocal cooperation in connection with solid waste disposal problems. 42 U. S. C. A. § 3254.

17. P. L. 1973, c. 363 constitutes an undue burden upon interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the United States Constitution.

18. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

19. Plaintiffs repeat the allegations contained in paragraphs 20 through 22 inclusive of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IX.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive, and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes the taking of private property for public use without just compensation in violation of Amendment 5 and Amendment 14 of the United States Constitution.

WHEREFORE, plaintifis demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT X.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363, constitutes the taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs, demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contracts, in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contract in violation of Art. 4, Sec. 7, par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Inasmuch as more than one object is embraced by P. L. 1973, c. 363, said enactment violates Art. 4, Sec. 7, Par. 4 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Section 2 of P. L. 1973, c. 363 contains an unconstitutional delegation of legislative power in violation of Amendment 14 of the United States Constitution, and Art. 4, Sec. 1, Par. 1, of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is so vague and uncertain as to deny plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is violative of due process of the law as constituting an arbitrary, capricious and unreasonable exercise of power by the Legislature, as provided in Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is void for failure to provide adequate standards to an administrative agency in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIX.

1. N. J. S. A. 13:1I-4a provides as follows:

> The commissioner shall have the power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

2. The power to prohibit, as distinguished from the power to regulate, the incineration or landfill of solid waste and the treatment or disposal of liquid waste has been preempted by the federal government.

WHEREFORE, plaintiffs demand judgment:

a. Declaring the grant of power to prohibit the treatment or disposal of solid and liquid waste contained in N. J. S. A. 13:1I-4a unconstitutional.

b. That this Court grant costs of suit; and

c. That such other relief be granted by the Court as seems to it just and equitable.

Jamieson, Walsh, McCardell, Moore & Peskin
A Professional Corporation
By /s/ HERBERT F. MOORE
Herbert F. Moore

Affidavit of Richard A. Peluso, Dated January 16, 1974.

A Professional Corporation
JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
One West State Street
Trenton, N. J. 08608
(609) 396-5511

Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed almost all course work toward a doctor's degree in said field.

3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health; welfare or safety of the residents of the State of New Jersey.

5. As a general rule, there is a direct relationship between the length of time consumed in bringing a sanitary landfill to final grade including placement of the final impermeable cover thereon, and the potential for environmental pollution.

6. If the effect of P. L. 1973, c. 363, or proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 is to reduce the volume of solid waste treated and disposed of in New

Jersey and thereby extend the time within which landfills are brought to final grade and final cover then such statute and proposed rules may have the effect of increasing, rather than decreasing such danger as may exist to the quality of the environment.

7. In the event the court would grant restraints enjoining the enforcement of P. L. 1973, c. 363, or the adoption or enforcement of proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, the public health, welfare and safety would no no way be jeopardized provided said waste continued to be treated and disposed of in accordance with the terms of applicable Federal and New Jersey state and administrative laws, rules and regulations.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 16th day of January, 1974.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

Counsel to the Governor
RICHARD W. DEKORTE

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 18, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Counsel to the Governor

Encl.

cc: Richard J. Sullivan, Commisioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

JAMIESON, WALSH McCARDELL,
MOORE and PESKIN
A PROFESSIONAL CORPORATION
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
Docket No. L-15068-73 P. W.
CIVIL ACTION

CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa., CITY OF GLEN COVE, a municipal corp. of the State of N. Y., LANDFILL and DEVELOPMENT COMPANY, a N. J. corp., MAC SANITARY LANDFILL, INC., a N. J. corp., KINSLEY'S LANDFILL, INC., a N. J. corp. & DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corp.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Cor-

poration, by Arthur Meisel, Esquire, attorneys of the plaintiffs, notice having been informally given to the Office of the Attorney General of New Jersey, and it appearing to the Court from the duly verified complaint and the affidavits annexed thereto that immediate and irreparable damage will probably result to the plaintiffs before a hearing can be had on an application for a temporary restraining order in this action:

It is on this 21st day of January, 1974,

ORDERED, that the defendants show cause before the Superior Court, Law Division, at the Mercer County Court House, South Broad and Market Streets, Trenton, N. J. on the 1st day of February, 1974 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard why an injunctive order should not be issued restraining and enjoining the defendants according to the demand of the complaint until the final hearing of this action.

IT IS FURTHER ORDERED, that the defendant, Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management and that the State of New Jersey desist and refrain from enforcing the provisions of P. L. 1973, c. 363 until the constitutionality of same has been determined, and that said restraints apply to defendants and their agents, employees, servants and attorneys.

IT IS FURTHER ORDERED, that the defendants have leave to move for a dissolution or modification of the restraints hereby imposed on 2 days notice to the plaintiffs.

IT IS FURTHER ORDERED, that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendants within 2 days from the date hereof.

GEORGE Y. SCHOCH

J. S. C.

Filed February 5, 1974

JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
A Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
Docket No. L-15068-73 P. W.

CIVIL ACTION
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Herbert F. Moore, Esq., attorneys for plaintiffs, and in the presence of Joseph M. Clayton, Jr., Deputy Attorney General of the State of New Jersey, attorney for defendants, and the Court having considered the complaint and affidavits attached thereto and the answer filed on behalf of the defendants, and having heard the arguments of the respective counsel, and being satisfied that the plaintiffs are entitled to an order restraining defendants as demanded.

And it appearing that the Order to Show Cause made on the 25th day of January, 1974 has been duly served as therein directed,

It is on this 1st day of Febr., 1974,

ORDERED, that the State of New Jersey shall desist and refrain from enforcing the provisions of P. L. 1973, c. 363;

IT IS FURTHER ORDERED, that Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from enforcing N. J. A. C. 7:1-4;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from adopting any rule or administrative order, of any nature or descripiton, which would prohibit the treatment or disposal in New Jersey of solid waste collected or originating in another state, or which would prohibit transportation of such waste into this state for disposal purposes;

IT IS FURTHER ORDERED, that the restraints contained herein shall apply to the aforesaid defendants and their agents, employees, servants and attorneys until the further order of this Court.

/s/ GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove, a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp., Kinsley's Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT.

DISTRICT OF COLUMBIA } *ss.:*

ARSEN J. DARNAY, of full age, being duly sworn according to law, deposes and says:

1. I am the Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency.

2. The statements on the attached letter to Mr. Herbert F. Moore dated January 29, 1974 are all true to my personal knowledge.

ARSEN J. DARNAY
Arsen J. Darnay

Sworn to and Subscribed before me this 29 day of January, 1974.

A. BLAKEMAN EARLY
A. Blakeman Early
Attorney at Law of the District of Columbia

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D. C. 20460

Mr. Herbert F. Moore, Esq.
Jamieson, Walsh, McCardell, Moore and Peskin
One West State Street
Trenton, New Jersey 08608

Dear Mr. Moore:

In connection with current litigation in which you are engaged with the State of New Jersey, you have requested a statement of this Agency's position on the legislative action by the State of New Jersey which will prohibit as of February 1, 1974, the importation into the State of any solid or liquid waste originating or collected outside the State. I understand also that the State has adopted under its emergency procedures implementing regulations which with some narrow exceptions, will ban importation for land disposal of any such waste. Thus, it would appear that the treatment and disposal within New Jersey of most wastes generated outside the State will be illegal and subject to severe enforcement penalties as of February 1, 1974.

It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute and these regulations.

If this statute and implementing regulations are allowed to become effective February 1, the City of Philadelphia would significantly increase and continue the incineration of its solid waste. The incineration of such quantities of solid waste would result in the emission of particulate matter in violation of health related air quality standards and the Clean Air Act of 1970. (See Affidavit of Mr. David J. Damiano, Commissioner of Streets, City of Philadelphia, page 3.)

Representatives of EPA have testified on two occasions on other proposals to ban the importation and disposal in New Jersey of out-of-state wastes. Copies of the statements of Meyer Scolnick before the Hackensack Meadowlands Development Commission on June 18, 1973, and of John A. Ruf before the New Jersey Department of Environmental Protection on December 13, 1973, are enclosed. These statements, together with this letter, represent the position of the Environmental Protection Agency. Copies will be distributed to the State and to others who have expressed an interest in this matter.

In brief, EPA's position is that a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act, the administration of which law is an EPA responsibility. The EPA Administrator is charged with encouraging (1) cooperative activities by the States and local governments in connection with solid waste disposal programs; (2) interstate, inter-local, and regional planning for, and the conduct of, interstate, inter-local and regional waste disposal programs; and (3) the enactment of improved and, so far as practical, uniform state and local laws governing solid waste disposal. The New Jersey legislation will work at cross purposes with the plans and goals EPA is striving to implement under the role given to it by the Solid Waste Disposal Act. Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number

of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

While the concerns of the several States as to the growing scarcity of landfill disposal sites are understandable, restrictions on out-of-state wastes reflect a narrow, parochial view without due regard to more significant problems and values involved in the national policy in favor of regional planning for solid waste disposal consistent with the achievement of environmental quality goals on a regional basis in this and the related environmental areas in which EPA is making efforts to combat water pollution under the Federal Water Pollution Control Act Amendments of 1972 and air pollution under the Clean Air Act. Environmental planning in the opinion of this Agency means regional planning and not restrictive legislation by a jurisdictional entity in its own short-range self interest. This means that solid waste processing and disposal facilities should be planned, designed and constructed so as to serve "waste sheds" which may encompass more than one city or State, and not merely the jurisdictional entity in which it is located or in which the waste is generated.

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

The control of available landfill sites development in light of land use planning as reflected in State laws, regulations and policies in such areas as "wetlands" preservation, area development (such as in the Hackensack Meadowlands), open-space, recreational, agricultural and park area designations and zoning and growth development planning are admirable efforts of environmental control provided such efforts take into account the total environmental picture and address the significant problems of air quality, water quality, waste water treatment as well as solid waste treatment and disposal. A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices.

Sincerely yours,

ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator
for Solid Waste Management Programs
(HM-562)

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

By: Joseph M. Clayton, Jr.
Deputy Attorney General
(609) 292-6597

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc. et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ANSWER

Defendants, by way of answer to the complaint in the above captioned matter, say:

COUNT 1.

1. The allegations contained in Paragraphs 1 through 6 of the First Count of the Complaint are admitted.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the First Count of the Complaint.

3. The Solid Waste Management Act referred to in Paragraph 8 of the First Count of the Complaint speaks for itself.

4. The allegations contained in Paragraph 9 of the First Count of the Complaint are admitted.

5. With respect to the allegations contained in Paragraphs 10 and 11 of the First Count of the Complaint, the Waste Control Act (L. 1973, c. 39) speaks for itself.

6. Defendants admit the allegations contained in Paragraphs 12, 13 and 14 of the First Count of the Complaint; however, said regulations (N. J. A. C. 7:26-1.8.1 and 1.8.2) have been superseded by L. 1973, c. 363, and said regulations will not be adopted by the Department.

7. The Solid Waste Utility Control Act referred to in Paragraph 15 of the First Count of the Complaint speaks for itself.

8. The allegations contained in Paragraph 16 of the First Count of the Complaint are denied.

9. The allegations contained in Paragraph 17 of the First Count of the Complaint are admitted.

10. The allegations contained in Paragraph 18 of the First Count of the Complaint are denied.

11. The allegations contained in Paragraph 19 of the First Count of the Complaint are denied.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the First Count of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the First Count of the Complaint.

14. The allegations contained in Paragraph 22 of the First Count of the Complaint are denied.

COUNT 2.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Second Count of the Complaint are denied.

COUNT 3.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Third Count of the Complaint are denied.

COUNT 4.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourth Count of the Complaint are denied.

COUNT 5.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifth Count of the Complaint ar denied.

COUNT 6.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixth Count of the Complaint are denied.

COUNT 7.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventh Count of the Complaint are denied.

COUNT 8.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraphs 2 through 12 of the Eighth Count of the Complaint are admitted, except that the various laws of the State of New Jersey referred to in said allegations speak for themselves.

3. Defendants admit that the preservation of additional landfill acres for solid waste generated in New Jersey was one of the reasons for the enactment of a ban on the disposal in New Jersey of waste originating outside the State.

4. The allegations contained in Paragraph 14 of the Eighth Count of the Complaint are admitted.

5. The allegations contained in Paragraph 15 of the Eighth Count of the Complaint are denied.

6. The laws of the United States, specifically 42 U. S. C. § 3254, speak for themselves.

7. The allegations contained in Paragraph 17 of the Eighth Count of the Complaint are denied.

8. The allegations contained in Paragraph 18 of the Eighth Count of the Complaint are denied.

9. Defendants repeat their answers to the allegations contained in Paragraphs 20 through 22 of the First Count of the Complaint and incorporate same herein by reference.

COUNT 9.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Ninth Count of the Complaint are denied.

COUNT 10.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Tenth Count of the Complaint are denied.

COUNT 11.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eleventh Count of the Complaint are denied.

COUNT 12.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Twelfth Count of the Complaint are denied.

COUNT 13.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Thirteenth Count of the Complaint are denied.

COUNT 14.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourteenth Count of the Complaint are denied.

COUNT 15.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifteenth Count of the Complaint are denied.

COUNT 16.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixteenth Count of the Complaint are denied.

COUNT 17.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventeenth Count of the Complant are denied.

COUNT 18.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eighteenth Count of the Complaint are denied.

COUNT 19.

1. N. J. S. A. 13:1I-4(a) speaks for itself.

2. The allegations contained in Paragraph 2 of the Nineteenth Count of the Complaint are denied.

FIRST SEPARATE DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE.

To the extent that the complaint constitutes a challenge to the administrative regulations adopted by the Department of Environmental Protection, the Superior Court, Law Division, lacks jurisdiction over the subject matter thereof.

THIRD SEPARATE DEFENSE.

The enactment of L. 1973, c. 363 has superseded the proposed regulations referred to in the complaint as

N. J. A. C. 7:26-1.8.1 and 1.8.2. The Department has indicated its intent to not adopt those proposed regulations. Thus the allegations with respect to those regulations are moot.

FOURTH SEPARATE DEFENSE.

Plaintiffs have failed to exhaust their administrative remedies.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

I hereby certify that the within pleading has been served within the time prescribed by Rule 4:6.

JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

Pereira Deposition, Dated March 13, 1974.

[64]

particular site Joe Miller has all the ground water data and he is in the ground water section.

When it comes to a ground water, the formation, the location and so on and so forth, they turn to me.

Then, of course, Dr. Kemball Widmer, who is our Chief, as in all offices where the brass is concerned, he would have the ultimate say.

Mr. Meisel: That is all I have.

• • •

LINO F. PEREIRA, sworn.

DIRECT EXAMINATION.

By Mr. Meisel:

Q. Mr. Pereira, I am going to ask you a series of questions.

The purpose of the questions is to in no way trick you but simply to elicit answers to the questions that are asked.

If you do not understand a question at any time or if the question needs to be rephrased for you to understand it, please ask me and I will do so.

A. Right.

Q. Could you please state your place of employment.

A. I work for the New Jersey Department of Environmental Protection, the Bureau of Solid Waste Management

[65]

in the Division of Environmental Qu. lity.

Q. What is your position in that Bureau?

A. I am principal environmental engineer with that Bureau.

Q. How long have you served in that capacity?

A. For approximately 10 months.

Q. Were you employed by the State of New Jersey prior to that time?

A. Yes. I have been employed by the State and specifically the Bureau of Solid Waste Management since early June of 1970.

Q. In what capacity were you employed prior to being employed as principal engineer?

A. For the first year of my employment I was employed with the title of Chemical Engineer Trainee.

For the subsequent year I was employed as an Assistant Environmental Engineer.

For approximately 11 months thereafter I was employed as a senior environmental engineer and since that time I have held the title of Principal Environmental Engineer.

Q. Were you employed for any other concern prior to coming with the State?

A. Not on a full-time basis, that is, not other than summer work and part-time work while I was in college.

Q. When did you graduate from college?

[66]

A. In 1970.

Q. With what degree?

A. Bachelor of Science in Chemical Engineering.

Q. Do you hold any license issued by the State of New Jersey?

A. Not any license, not as a licensed professional engineer although I am registered with the Board of Professional Engineers under Title 45 as an engineer in training, which is a prerequisite for obtaining a license as a professional engineer.

Q. I notice that you have obtained a BS in Chemical Engineering.

Did you have any specific course work concerning sanitary engineering?

A. None specifically concerning sanitary engineering although a number of the courses one is required to take for chemical engineering are also required by sanitary engineering.

Q. Are you familiar with Public Law 1973 Chapter 363 passed by the State of New Jersey, being an act to prohibit any person from bringing into this state any solid and liquid waste which originated or was collected outside the state and supplementing the Waste Control Act approved February 21, 1973?

A. Yes, I am.

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[87]

department are based largely upon the state of the art at this time and not upon the threat or not necessarily upon the threat to the health, safety and welfare.

Q. I would request that the last question that I asked be answered with a Yes or No because your response did not answer that question.

Mr. Meisel: Read it back, please.

(The reporter read the pending question.)

Mr. First: If you can answer that Yes or No, go ahead.

A. It is a rather difficult question to answer.

Q. The standards either are or are not adequate. It seems to me that it can be answered Yes or No.

A. My answer would be as they are now promulgated they are not adequate, in my opinion.

Q. Are the standards as proposed in the proposed rules of the Bureau of Solid Waste Management adequate

to protect the public health, safety and welfare or the quality of the environment?

A. Only insofar as those standards are met by the operation.

Q. All right. So if they are met is your answer Yes?

A. My answer is Yes but it is qualified to the extent that sometimes it is not feasible or possible to men-

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[99]

know about.

Q. How does the Department of Environmental Protection compute the life expectancy of a particular landfill site?

A. The only method or the method that the department has used and does use in computing the life expectancy of a sanitary landfill site utilizes the information submitted with the engineering design, that information being the life expectancy of the site as calculated by the design engineer and the tonnage received at the site per week.

The calculation by the department assumes that the tonnage will remain constant and that the engineer calculated his life expectancy on that constant tonnage and the calculation involves taking the tons per week—well, I can probably stop here and say that for any particular site the life expectancy is given to us in the engineering design by the licensed professional engineer who provided it and it is assumed that he does so based on current tonnages or expected tonnages at the site.

Q. Let us suppose that it is a 200-acre site, that the site is uniform throughout and as a result there are no special problems, the entire site is useful, that 10,000 tons per week is brought to that site, that the site will be built

up by 50 feet, that one is using the usual six inches of daily cover and 2 feet of final cover, what would

[100]

the anticipated life expectancy of that site be, utilizing the best compaction methods available in the state of the art?

A. We are speaking about a 200-acre site by 50 feet in depth, uniformly 50 feet across the entire thing?

Q. That is correct.

A. And you were asking for the maximum amount of solid waste that can be placed therein?

Q. I am asking for the anticipated life expectancy of the site.

A. Could you give me the rate at which tonnage is brought in again?

Q. 10,000 tons per week.

A. Are we pre-supposing here that the operator utilizes the space to the maximum by under existing standards creating each lift as high as is permitted under existing standards?

Q. Yes, we are.

A. Are you asking me to calculate it or do you want to know how we would calculate it?

Q. I am asking you to calculate it.

A. My calculations bring this to over 12 years or 12.4 years in fact, assuming that one-fifth of the volume is consumed by soil cover.

Q. What is the expected or anticipated life

[101]

expectancy of landfills presently existing in the State of New Jersey?

A. That is very difficult to calculate because of a number of factors.

Our best estimate is that the existing landfills in the state have no more than 10 years of life.

Q. Would the life expectancy of existing landfills be increased by using a variety of processing alternatives to reduce weight and/or volume of solid waste?

A. Yes, I believe so.

Q. Has there been any estimate as to how long that life expectancy would be extended by using such processing alternatives?

A. No, there hasn't been any estimate to my knowledge.

Q. Has there been any estimate as to the availability of additional acreage in the State of New Jersey for sanitary landfill purposes?

A. No estimate has been made but noting the establishment of new sanitary landfills, the rate of that establishment is low compared to the frequency with which landfills cease to exist in this state.

Q. Can new sanitary landfills be established in the State of New Jersey?

A. Yes, I believe they can be established.

[102]

Q. You indicated earlier that certain kinds of land may be more suitable other than kinds of land for sanitary landfill purposes.

A. That's correct.

Q. Is there any estimate as to the number of acres of the most suitable land for sanitary landfill purposes which presently exists in the State of New Jersey?

A. I find that a very difficult question to answer because, first, it speaks to the relative suitability of one piece of land over another piece of land for the use of sanitary landfill.

If one defines one's standards stringently enough, I suppose it is possible to end up with very little square feet of land that is entirely suitable.

Q. Under existing standards in the State of New Jersey which could not be used for sanitary landfill purposes?

A. Yes.

Q. What kind of land could not be used?

A. Lands which are, for instance, protected in their natural state as are flood plains, wetlands, various tidal lands existent in the state as well as, of course, other restrictions such as local land use requirements so far as they apply to sanitary landfill sites.

[103]

Q. I am not speaking to whatever local land use requirements there might be.

A. You are speaking only of environmental considerations?

Q. Approximately how many acres would you calculate there are involved in the kinds of land you suggested would be absolutely unsuitable or unusable for sanitary landfill purposes?

A. I don't know.

Q. Does it represent a substantial portion of the land of the State of New Jersey in terms of the total land area of the state or does it represent an insubstantial total land area taken the total land area of the state?

A. Again I don't know because I don't deal specifically with those lands.

I can only answer that in my experience with the review of designs and the approval of existing facilities in the state that a substantial portion of the existing facilities, sanitary landfills in the state does now or did consist of those lands.

Q. Who is responsibile for working in those areas?

A. The Wetlands Act is administered specifically by the Wetlands Section in the Division of Marine Services in the Department of Environmental Protection.

The flood plain reqirements are administered speci-

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[112]

Q. Is it the volume of solid waste which causes a threat?

A. Yes, in terms of its tonnage, the actual quantity of waste, the degree of threat is directly proportionate to the tonnage of waste disposed.

Q. If there was less tonnage would the threat or could the threat be diminished to a point where it would not pose a substantial or material threat?

A. I suppose it could but I could not possibly put my finger on the tonnage that would not pose a substantial or material threat.

It may only be one ton. I don't know.

Q. Can New Jersey dispose of all or a portion of its solid waste outside the State of New Jersey?

A. Can it do so?

Q. Yes.

Mr. First: You mean can the people of the state?

Mr. Meisel: Yes.

A. As far as I know under existing legislation it can be done. It is possible.

Q. Are there instances in which communities in New Jersey dispose of all or a portion of the solid or liquid waste originating in those municipalities outside of the State of New Jersey?

[113]

A. There have been instances in the past and even in the recent past, if one considers 1971 the recent past. I am not familiar with the communities or the quantities after 1971.

Q. Does the City of Phillipsburg dispose of substantially all its solid waste outside the State of New Jersey?

A. It did in the calendar year 1971 as far as I know.

Q. Are there sanitary landfill facilities outside of the State of New Jersey which accept solid waste which originates inside of the State of New Jersey?

A. I don't know if there are sanitary landfill facilities.

Our records merely indicate that in the Calendar year 1971 some wastes were exported from the state to disposal sites outside the state.

Q. Has the Department of Environmental Protection explored the question as to whether a greater percentage than now exists of solid waste originating in New Jersey can be disposed of outside the State of New Jersey?

A. You mean by that have we contemplated sending more out?

Q. No. I am asking if you have looked into alternatives, whether there are facilities to which you could

[114]

send solid waste originating in New Jersey which exist outside the State of New Jersey.

A. I can think of no effort on our part to look into that at all.

Our planning for Solid Waste Management has assumed that New Jersey will bear the responsibility for its own wastes.

The planning has gone on accordingly.

Mr. Meisel: I think we can break for the day.

• • •

Filed March 21, 1974

JAMIESON, WALSH, McCARDELL, MOORE
AND PESKIN,
a Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al
Defendants

NOTICE OF MOTION

TO: WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

SIR:

Please take notice that the undersigned, attorneys for plaintiffs, will apply to the Superior Court of New Jersey,

Mercer County Court House, Trenton, New Jersey on Friday, March 22, 1974 at 9:00 A. M. or as soon thereafter as counsel may be heard, for summary judgment in favor of plaintiffs only upon the issues of federal preemption and discrimination against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution; and plaintiffs will make further application for an order to set the date of hearing on the merits of the matter, if such hearing is necessary, on Monday, April 15, 1974, or upon such other day as may be ordered by the court and not on Monday, March 25, 1974 as presently scheduled.

On or before Monday, March 18, 1974, there will be served upon defendants the documents upon which plaintiffs will rely at the hearing on this motion.

JAMIESON, WALSH, MCCARDELL, MOORE
and PESKIN
A Professional Corporation

by: ARTHUR MEISEL
Arthur Meisel

Dated: March 14, 1974

PORTION OF BRIEF FILED IN TRIAL COURT BY APPELLEES.

It is thus evident that the court must consider *"all the relevant facts and circumstances."* At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.* The Supreme Court has stressed that:

> *". . . state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.* Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 U. S. 8, 87 L. ed. 578, 63 S. Ct. 420); Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594.
>
> • • •
>
> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and *whether the relative weights of the state and national interests involved are such as to make inapplicable the rule. . ." Southern Pacific Co. v. Arizona,* 325 U. S. 761, 770, 89 L. Ed. 1915, 1925, 65 S. Ct. 1515 (1944) (emphasis added).

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the affect on interstate commerce.

• • •

WILLIAM F. HYLAND
Attorney General Of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY

DOCKET No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

NOTICE OF APPEAL

To: CLERK OF THE COURT
HONORABLE GEORGE Y. SCHOCH
Judge, Superior Court of New Jersey
Mercer County Court House
Trenton, New Jersey 08607

HERBERT F. MOORE, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
One West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Interstate 287 and McKinley Street
South Plainfield, New Jersey 07080

SIRS:

NOTICE IS HEREBY GIVEN that all defendants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey, appeal to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring P. L. 1973, c. 363 unconstitutional as violative of Article I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Mark L. First
Deputy Attorney General

DATED: April 19, 1974

I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-2202-73

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

MOTION FOR STAY PENDING APPEAL.

To: CLERK OF THE COURTS

ARTHUR MEISEL, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
Attorney for Plaintiffs-Appellants
1 West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Attorney for Plaintiffs-Intervenors-Appellants
Interstate 287 and McKinley Street
South Plainfield, New Jersey

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants-appellants, hereby moves the Superior Court of New Jersey, Appellate Division, for an order staying the judgment entered by the Superior Court of New Jersey. Law Division, Mercer County (Schoch A. J. S. C.) on March 27, 1974.

In support of the within motion, the defendants-appellants will rely on the brief and affidavits submitted herewith and the brief and appendix submitted on July 9, 1974.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Deputy Attorney General

DATED: July 26, 1974

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2202-73
Motion No. M-1978-73
Before Part P

Judges: HANDLER, MEANOR, CRANE

CITY OF PHILADELPHIA, etc., et als

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als

v.

STATE OF NEW JERSEY, et al.

Moving Papers Filed:	July 26, 1974
Answering Papers Filed:	August 8 & 9, 1974
Date Submitted to Court:	August 12, 1974
Date Argued:	
Date Decided:	August 14, 1974

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

	GRANTED	DENIED	OTHER
MOTION FOR STAY		X	X

SUPPLEMENTAL:

The appeal shall be accelerated.

FOR THE COURT:

ALAN B. HANDLER
P. J. A. D.

I hereby certify that the forgoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

WITNESS, THE HONORABLE ALAN B. HANDLER, PRESIDING JUDGE OF PART P, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, this 14th day of August, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

EXCERPTS FROM BRIEF OF APPELLANTS, STATE OF NEW JERSEY, FILED IN THE APPELLATE DIVISION.

(Pages 17-18.)

[17]

• • •

Similarly, the State of New Jersey does not recognize solid waste for disposal as a legitimate item of commerce. As did Indiana with dead horses, New Jersey only allows solid waste to be handled by those who are licensed and regulated under the concurrent jurisdiction of the Public Utilities Commission and the Department of Environmental Protection. N. J. S. A. 48:2-13; N. J. S. A. 48:13A-1, et seq.; N. J. S. A. 13:1E-1, et seq. The license and regulatory scheme is broad and pervasive and is designed to insure that the public health and environment are properly protected against this deleterious

[18]

substance. Surely, the above statutes clearly demonstrate that the State of New Jersey has not recognized waste as a legitimate item of commerce. Thus, P. L. 1973, C. 363 is consistent with, and not repugnant to, the rationale of the "natural gas" cases.

• • •

SUPREME COURT OF NEW JERSEY
#10927 September Term 1974

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause on March 25, 1974 in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-2202-73); be certified directly to this Court for review by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers to be filed by the parties in the prosecution of this appeal shall be filed by the Clerk of this Court without payment of fees for such filing; and it is further

ORDERED that this matter be consolidated with Hackensack Meadowlands Development Commission and State

of New Jersey v. Municipal Sanitary Landfill Authority, et al and City of Yonkers, New York (A-1592-73).

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton on this 7th day of October, 1974.

FLORENCE R. PESKOE
Clerk

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

ORDER GRANTING STAY AND CONTINUING INJUNCTIVE RELIEF.

This matter being opened to the court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs-respondents, Herbert F. Moore, Esq. appearing in the presence of Assistant Attorney General Stephen L. Skillman, attorney for defendants-appellants for an order temporarily staying the judgment of the Supreme Court of New Jersey in the above cap-

tioned matter and temporarily continuing the injunctive order heretofore entered by the Superior Court of New Jersey, Law Division, in connection therewith, and good cause being shown,

It is on this 20th day of November, 1975,

ORDERED, that the judgment of this court heretofore entered in this action on November 18, 1975 against plaintiffs-respondents be and hereby is temporarily stayed and that the injunctive order heretofore issued in connection with this case is hereby temporarily extended until further order of the court; and it is

FURTHER ORDERED, that plaintiffs-respondents shall file a memorandum with this court, and serve same upon the parties to this proceeding, not later than Wednesday, Nov. 26, 1975, demanding such relief as they deem appropriate including argument in support thereof, and defendants-appellants shall thereafter have a period of 10 days within which to file and serve a responsive memorandum thereto.

RICHARD J. HUGHES,
C. J.

Consent as to form:
William F. Hyland, Attorney General
of New Jersey
Attorney for Defendants-Appellants,
State of New Jersey, et al.

By: STEPHEN L. SKILLMAN,
Stephen L. Skillman,
Asst. Attorney General

Jamieson, McCardell, Moore, Peskin and Spicer

By: HERBERT F. MOORE
Herbert F. Moore

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 395-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

NOTICE OF MOTION.

To: Stephen L. Skillman, Esq.
Assistant Attorney General
State House
Trenton, N. J. 08625

NOTICE is hereby given by the undersigned, counsel for the plaintiffs-respondents, of the filing of a Motion with

the Supreme Court of New Jersey in accordance with the copy attached hereto.

Dated: November 26, 1975

JAMIESON, McCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

JAMIESON, McCARDELL, MOORE, PESKIN
and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants

MOTION FOR REMAND, STAY OF JUDGMENT AND CONTINUATION OF RESTRAINTS

TO: Honorable The Chief Justice
and Associate Justices of
Supreme Court of New Jersey:

The plaintiffs-respondents, City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and

DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.) move for an order of the New Jersey Supreme Court, in order of preference, and in the alternative, for the following relief:

A. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) all issues raised in the complaint; and (2) whether, and for what period, injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey;

B. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) taking of private property for public use without just compensation; (3) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

C. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

D. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

E. Stay of judgment and continuation of injunctive relief pending a determination by the United States Su-

preme Court of an application by plaintiffs for continuing injunctive relief pending appeal.

Plaintiffs-Respondents will rely upon the annexed Brief and Appendix in support of said Motion.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY
M-436 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Movants,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-433 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay and continuation of injunctive relief is denied; and it is further

ORDERED that the order temporarily staying the judgment and injunctive order, entered November 20, 1975, is vacated, effective December 31, 1975.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC.
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER

A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
Docket No. L-15068-73 P.W.
Civil Action

CITY OF PHILADELPHIA, etc, et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ORDER

This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs, Herbert F. Moore, Esq. appearing, in the presence of Stephen L. Skillman, Esq., Assistant Attorney General of the State of New Jersey, attorney for defendants, and Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors, and good cause being shown,

It is on this 19th day of December, 1975:

ORDERED, that Counts II, III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII contained in plaintiffs' complaint in lieu of prerogative writs filed in

the above captioned matter are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that Counts Two, Three, Four, Five, Six, Seven and Eight of the amended complaint filed by plaintiffs-intervenors in the above captioned matter, are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VIII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter.

GEORGE Y. SCHOCH, J. S. C.

William F. Hyland, Attorney General of New Jersey
Attorney for Defendants

By: STEPHEN SKILLMAN
Assistant Attorney General

Consent as to form and entry.
JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER, *A Professional Corporation*
Attorneys for Plaintiffs

By: ARTHUR MEISEL
VINCENT J. DOTOLI,
Attorney for Plaintiff-Intervenors

SUPREME COURT OF THE UNITED STATES

No. A-563

CITY OF PHILADELPHIA, ET AL.,
Appellants

v.

NEW JERSEY, ET AL.

ORDER.

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey entered November 18, 1975, in case No. A-82, be and the same is hereby, stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 31 day of December, 1975

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By FRANCIS J. CORSON

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, reversing the trial court's declaration that P. L. 1973, c. 363 unconstitutionally discriminates against interstate commerce, entered in this action on November 18, 1975.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
Counsel for Appellants

by: HERBERT F. MOORE

Dated: January 8, 1976

Supreme Court of the United States

—

No. A-24

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

—

ORDER.

—

UPON CONSIDERATION of the application of counsel for the petitioners, the response filed thereto, the memorandum of the United States as Amicus Curiae, and the reply of petitioners,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey, A-82, entered June 20, 1977, be and the same is hereby stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or

postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of July, 1977

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States

By LAURENCE P. GILL
Deputy

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

—

No. _____

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.)
Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey entered on June 20, 1977, on Remand from the Supreme Court of the United States.

Appellants further appeal from the prior judgment of the Supreme Court of the State of New Jersey entered in this action on November 18, 1975, which judgment was vacated by the Supreme Court of the United States by its mandate issued on March 22, 1977, and subsequently reaffirmed by the Supreme Court of New Jersey by its judgment entered on June 20, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(2). Review will be sought, in the alternative, by certiorari pursuant to 28 U. S. C. § 1257(3).

JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER
A Professional Corporation
Counsel for Appellants

by: /s/ HERBERT F. MOORE
Herbert F. Moore
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511

Dated: July 22, 1977

Certificate of Service.

I hereby certify that on this 22nd day of July, 1977, a copy of the Notice of Appeal was mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, to Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080, and to David N. Samson, Esq., attorney for defendants-respondents in the companion case Hackensack Meadowlands v. Mun. Landfill Auth., A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052; and to Honorable Wade H. McCree, Jr., Solicitor General of the United States Department of Justice, Washington, D. C. 20430.

I further certify a that all parties required to be served have been served.

HERBERT F. MOORE
Herbert F. Moore

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn according to law, upon his oath says:

1. I am the President of Landfill and Development Company (hereinafter L & D), a public utility of the State of New Jersey holding a duly issued temporary Certificate of Public Convenience and Necessity by the New Jersey

Public Utilities Commission. L & D duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a Sanitary Landfill Registration Certificate, and a temporary certificate was duly issued by said Department.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. The disposal of solid waste is governed by Chapter VIII, "Refuse Disposal" of the New Jersey State Sanitary Code, which Code is enforced by the aforesaid Department of Environmental Protection.

4. In accordance with authority conferred by N. J. S. A. 13:1E-1 et seq. and N. J. S. A. 13:1I-1 et seq., the said Department of Environmental Protection proposed a comprehensive revision to the Rules of the Bureau of Solid Waste Management which would further govern and regulate the operation of sanitary landfills in New Jersey, including the treatment and disposal of solid waste therein.

5. L & D has entered into a written contract with the City of Philadelphia pursuant to which L & D has agreed to treat and dispose of a stated quantity of solid waste which originates or is collected in said City.

6. Section 7:26-1.8.2, being one section in the aforesaid proposed Revision to the Rules of the Bureau of Solid Waste Management, provides that,

> "no person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside of the territorial limits of this State."

7. In addition, P. L. 1973, c. 363 which will become effective February 1, 1974, provides that no wastes generated outside of the State of New Jersey shall be treated or disposed of within said State, and further provides as follows:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974 (a) determine that waste which originates or was collected outside of New Jersey can be disposed of within said state without endangering the public health, safety and welfare and (b) promulgates regulations permitting and regulating the treatment and disposal of such waste, then L & D will be prohibited from the further treatment and disposal of waste in accordance with the terms of its written contract with the City of Philadelphia.

9. If L & D is prohibited from fulfilling the terms of its obligations with the City of Philadelphia, it will lose very substantial and considerable profits, and will suffer

grievous damages, the amount of which cannot be calculated with any reasonable certainty.

Based upon existing regulations governing the treatment and disposal of solid waste, the State of New Jersey will not be materially or substantially adversely affected by the issuance of a temporary restraining order, while on the other hand, the business of L and D would be grievously and substantially affected if such restraining order was not granted.

10. Upon information and belief the proposed Rule 7:26-1.8.2 and P. L. 1973, c. 363 was motivated by a desire on the part of the State of New Jersey to assure the availability of landfill acres in New Jersey for solid waste generated in that state and, as an incident thereto, to stabilize the cost of solid waste disposal for New Jersey residents. Said information and belief is based upon (a) a statement by the New Jersey Department of Environmental Protection appearing on pages 7 and 8 of a document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", a copy of which section is attached hereto and made part hereof as Exhibit A, and, (b) the last paragraph of a letter dated December 16, 1973 from Richard W. DeKorte, Counsel to the Governor to David Quient, Esquire, City Attorney of the City of Glen Cove, which states that S. 2367 (O. C. R.) (now P. L. 1973, c. 363) would not be introduced "had the sister states of New Jersey permitted solid wastes originating in our state to be disposed of at or near the point of origination." A copy of said letter is attached hereto and made part hereof as Exhibit B.

11. Accordingly, both P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 appear to be retaliatory in nature and not actually based upon the immediate potential for harm to the health of the community.

12. Federal legislation encourages interstate and regional solutions, where applicable, to solid waste disposal and recovery as evidenced by 42 U. S. C. A. § 3254, a copy of which is attached hereto as Exhibit C.

13. In addition to the aforesaid, if L & D is prohibited from disposing of solid waste which originated or was collected outside of New Jersey, the continued operation of said sanitary landfill may be and become economically unfeasible, thereby impairing the public interest.

LEO F. HUGHES, 3RD
Leo F. Hughes, 3rd

Sworn to and subscribed before me this 16th day of January, 1974.

ARTHUR MEISEL
Arthur Meisel
Attorney at Law of New Jersey

Exhibit A.

• • •

IV. *Out-of-State Waste*

In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that

same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

• • •

Exhibit B.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel for the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 13, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Richard W. DeKorte
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

Exhibit C.

§ 3254. Encouragement of interstate and interlocal cooperation

The Secretary shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; encourage, where practicable, interstate, interlocal, and regional planning for, and the conduct of, interstate, interlocal, and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal.

MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR STAY PENDING COMPLETION OF REMAND AND FOR EXPEDITED BRIEFING AND ARGUMENT.

To: Clerk of the Court

Jamieson, McCardell, Moore,
Peskin & Spicer, Esqs.
Attorneys for Plaintiffs-Respondents
19 Chancery Lane
Trenton, New Jersey 08618
Attn: Herbert F. Moore, Esq.

Sirs:

Please Take Notice that the undersigned, representing the defendants-appellants, Department of Environmental Protection and Commissioner of Environmental Protection, hereby moves for clarification that the court's prior orders permit enforcement of chapter 363 of the Laws of 1973 or, in the alternative, for a stay of any lower court injunctive order which may be found presently to bar enforcement of chapter 363, and the defendants-appellants further move for the setting of an expedited schedule for the filing of briefs and oral argument on the remand from the Supreme Court of the United States.

In support of this motion, the defendants-appellants will rely upon the attached brief, affidavits and appendix.

William F. Hyland
Attorney General of New Jersey
Attorney for Defendants-Appellants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Commissioner of the Department of Environmental Protection.

By /s/ Stephen Skillman
Stephen Skillman
Assistant Attorney General

Dated: March 15, 1977

ORDER GRANTING MOTION FOR ACCELERATION

SUPREME COURT OF NEW JERSEY

September Term 1976

M-724 – M-725

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Movants.

This matter having been duly presented to the Court, it is ORDERED that the motion for acceleration is granted; and it is further

ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further

ORDERED that plaintiffs serve and file their brief on the merits on or before Wednesday, April 20, 1977 and that defendants serve and file their response thereto on or before Monday, May 2, 1977; and it is further

ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 4th day of April, 1977.

FLORENCE R. PESHOE
Clerk

AFFIDAVIT OF FRANK J. KUSERK.

(May 6, 1977.)

STATE OF NEW JERSEY
COUNTY OF GLOUCESTER } *ss.:*

Frank J. Kuserk, being duly sworn according to law upon his oath deposes and says:

I am the Supervisor of Air and Water Conservation for Texaco Inc., at the Eagle Point Plant in Westville, N. J.

This plant generates biological sludge.

This sludge had been disposed of in New Jersey, at the Ken-buc Landfill in Edison, New Jersey. This landfill was recently closed down.

I inquired of the Department of Environmental Protection of the state of New Jersey for a location to send this sludge for disposal. I was informed that there was no facility available in New Jersey unless we could increase the solids content to 25%. The Department of Environmental Protection mailed me a list of facilities (attached) located in the state of Pennsylvania and suggested we use one of these.

We are presently disposing of the biological sludge generated by this plant in the state of Pennsylvania.

F. J. KUSERK
F. J. Kuserk

Sworn to and Subscribed before me this 6th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney-At-Law

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

From the desk of

BEATRICE S. TYLUTKI, *Director*

Solid Waste Administration

Frank Kuserk:

Enclosed is a list of alternative landfill sites located in Pennsylvania that may be able to handle your waste sludge.

I would suggest contacting these people directly and then finding a hauler to transport the sludge to one of these locations.

/s/ RON BUCHANAN

TABLE A

FACILITIES WITH APPROVED MAN-MADE LINERS IN PENNSYLVANIA.

[*Note: Balance of Table is not printed—original illegible.*]

AFFIDAVIT OF RAY ROTHSCHILD.

(June 27, 1977.)

STATE OF NEW JERSEY
COUNTY OF UNION } *ss.:*

RAY ROTHSCHILD, of full age, being duly sworn upon his oath, according to law, deposes and says:

1. I am the President of Perk Chemical Co., Inc. of 217 South First Street, Elizabeth, N. J.

2. Perk Chemical Co. is engaged, among other things, in the spent chemical removal and recycling business.

3. The majority of our spent chemical customers are small businesses whose processes create chemical waste that cannot be disposed of by conventional means. This company collects for several hundred companies throughout the entire State of New Jersey.

4. The recycling process creates a residual waste which cannot be disposed of in conventional sanitary landfill sites. Until July of 1976, Perk Chemical used Kin Buc Sanitary Landfill in Edison, N. J. to dispose of these wastes. Since the closing of Kin Buc we can no longer dispose in New Jersey.

5. I have contacted the New Jersey Department of Environmental Protection, Solid Waste Division and discussed this problem with Mr. Rosenberg. I have been advised by the DEP that there is no place in New Jersey suitable for this waste and Mr. Rosenberg has recommended facilities in Pennsylvania, New York and more distant states. Some of the waste we have been compelled to haul to disposal sites more than 500 miles from Elizabeth, N. J.

6. At the present time our operation, and consequently that of the many, many customers from which we collect, are totally dependent upon facilities outside the State of New Jersey for disposal.

RAY ROTHSCHILD
Ray Rothschild

Sworn to and Subscribed before me this 27th day of June, 1977.

/s/ BARBARA Q. CHODACH
A Notary Public of the State of New Jersey
My Commission Expires on 8/14/77

AFFIDAVIT OF WILBUR HENRY.

(May 5, 1977.)

STATE OF NEW JERSEY }
COUNTY OF SOMERSET } *ss.:*

WILBUR HENRY, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am the Manager of Purchasing, Organic Chemical Division of American Cyanamid, Bridgewater Township, Somerset County, New Jersey.

2. This Company generates a commercial chemical type of waste. For many years this waste was disposed of at a New Jersey facility identified as Kin Buc Landfill, Edison, N. J.

3. On July 2, 1976, the New Jersey Department of Environmental Protection advised American Cyanamid by a letter to Daniel Dowiak that it could no longer use the Kin Buc site for chemical waste disposal. A copy of that letter is attached.

4. The D. E. P. also forwarded to American Cyanamid, by the same letter, a list of facilities in New Jersey and various other states that were permitted to handle various types of waste.

5. I contacted all of the New Jersey facilities and for one reason or another they were unable to accept our entire output of this chemical waste.

6. Chem-Trol in Model Cities, New York agreed to accept this waste. For a time American Cyanamid did use the New York facility, however, for various reasons they were unable to continue to accept this waste.

7. I then located a facility in Pennsylvania which is the only facility we are using for disposal of this waste.

WILBUR HENRY
Wilbur Henry

Sworn to and Subscribed before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Solid Waste Administration
Trenton. 08625

BEATRICE S. TYLUTKI
Director

July 2, 1976

Mr. Dan Dowiak
American Cyanamid Company
Berdan Avenue
Wayne, NJ 07470

Dear Mr. Dowiak:

This is in response to your recent inquiry regarding mercury wastes from your Bound Brook plant and the advisability of disposing of this material at the Kin-Buc Landfill in Edison Township, Middlesex County, New Jersey.

The Kin-Buc Landfill has been registered with the Department of Environmental Protection since 1970 for the acceptance of chemical and hazardous waste and they continue to be so registered.

The Kin-Buc Landfill has been the site of numerous environmental problems in recent months. The site has been accepting quantities of chemical and hazardous wastes greatly exceeding the amount which it is capable of handling properly. In view of these problems and due to the type of waste (2% mercury in organic solution) you have described to us, the Solid Waste Administration does not recommend the disposal of this material by landfilling.

Attached is a list of Waste Processing Facilities. Please contact these facilities directly regarding their ability to accept your waste material. It is quite possible that these facilities will require the separation of the mercury from the solution before acceptance.

If we can be of any further help in this matter, please feel free to contact this office.

Very truly yours,

LINO F. PEREIRA
Lino F. Pereira
Supervising Environmental Specialist
Solid Waste Administration

oms
Attachment

NEW JERSEY

Facility	*Type of Treatment*	*Type of Waste Accepted*
Astro Pak Corp. P. O. Box 796 235 Forrest Street Metuchen, NJ 08840 (201) 549-1788	Neutralization	Petro-base wastes including still and tank bottoms, organic sludge, chemical wastes and chemical by-products.
Blackwood Carbon Products Little Gloucester Road Blackwood, NJ (609) 227-8822	Oil Recovery	Recycle waste oil to obtain Grade 4 industrial fuel oil.
Browning Ferris Industries Chemical Services Division P. O. Drawer C Pedricktown, NJ 08067 (609) 299-0835	Chem-Fix Lagoon	Liquid and semi-liquid waste that can be chem-fixed (Liq-Wa-Con Method). If approved by BSWM, the wastes may then be landfilled at a designated site. Facility should be operating in about 2 months.
Chemical Control Corp. 23 South Front Street Elizabeth, NJ (201) 351-5460	Incineration Neutralization Solvent Recovery	Various liquid and solid chemicals, acids, solvents, etc.
Marisol Inc. 125 Factory Lane Middlesex, NJ 08846 (201) 469-5100	Solvent Recovery	Liquid organic chemicals, cleaners, halogenated hydrocarbons, oil wastes for reclamation.
National Converters, Inc. 459 Chestnut Street Union, NJ 07083 (201) 964-1550	Solvent Recovery	Chlorinated solvents, acids, alkalis, and other chemicals.
Rollins Environmental Serv. Inc. P. O. Box 221 Bridgeport, NJ 08014 (609) 467-3100	Incineration Neutralization Chemical Treatment Recovery	Industrial chemical wastes, limited explosives, poisons, including: acids, caustics, chlorinated and non-chlorinated organics, plating and etchant solutions, paint sludges, pesticides, cyanide, scrubber effluents, etc.
Scientific Chemical Processing 216 Paterson Plank Road Carlstadt, NJ 07072 (201) 589-7777	Solvent Recovery	Solvents, paint, oils, chlorinated hydrocarbons, acids, bases, slurries etc.
Solvent Recovery Service of NJ Sylvan Street Linden, NJ 07036 (201) 925-8800	Solvent Recovery	Chemical wastes, solvents. Specialize in distillation for recovery of solvents.

NEW YORK

Company	*Type of Waste Accepted*
Chemical Waste Disposal Corporation 42-14 19th Avenue Astoria, New York 11105 (212) 274-3339	Recovery/distillation of chlorinated solvents, and related solvents.
Chem-Trol Pollution Services, Inc. P. O. Box 200 Model City, New York 14104 (716) 754-8231	Most types of chemical-related wastes including solvents/cleaners, halogenated hydrocarbons, paint & coating sludges, oils and oily waste, toxic acids, alkalis, plating/etching wastes, cyanides, heavy metal solutions & residues, pesticides/PCB's, carcinogens, sludges and solids, arsenic and mercury wastes.
Frontier Chemical Waste Process, Inc. 4626 Royal Avenue Niagra Falls, New York 14303 (716) 285-8200	Industrial by-products and wastes of both organic and inorganic composition and of spec. materials. Electroplating; metal-finishing waste of heavy metals (Cr, Ca, Ni, Zn, Cd, Hg, Sn, Sb, Pb, As, etc.), acids, bases, salts, cyanide, cyinate, carsenogenics, compounds, oil, paints, inks, heterocyclics and halogenated compounds.
Pollution Abatement Services 155 East Third Street Oswego, New York 13126 (315) 343-3356	Oil wastes, paint sludges, solvents/cleaners, still and tank bottoms, and generally any organic or aqueous liquid.
Recycling Laboratories 112 Harrison Place Syracuse, New York 13202 (315) 422-4311	Industrial solvents (chlorinated and non-chlorinated caustics and acids with heavy metals, oil, vinyl, polyesters and pigment sludges.

PENNSYLVANIA

Company	*Type of Waste Accepted*
Chemfix Corporation 2901 Banksville Road Pittsburgh, Pennsylvania (412) 343-8611	Heavy metals, Neutralizes pickle liquors, cyanides, sludges, liquid and semi-liquid waste sludges—Handles only non-organics.
Chemical Application Company 116 Water Street Beverly, Massachusetts 01915 (617) 927-1680	Acids, caustics, halogenated hydrocarbons, oil wastes, solvents/cleaners, still and tank bottoms.

Company	*Type of Waste Accepted*
Safety Projects and Engineering, Inc. 3 Malden Street West Quincy, Massachusetts (617) 471-1327	No available list.
Silresim Chemical Corporation 86 Tanner Street Lowell, Massachusetts 01852 (617) 459-7342	Oil waste, solvents.

MAINE

Company	*Type of Waste Accepted*
The Crago Company, Inc. P. O. Box 409 Gray, Maine 04039 (207) 657-4785	Acids, caustics, halogenated hydrocarbons, heavy metals in solution, oil waste, paint sludge, pesticides, sludge and tank bottoms.

AFFIDAVIT OF ROBERT MEAGHER.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, Robert Meagher, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the President of Scientific, Inc., Scotch Plains, New Jersey.

2. On March 21, 1977, I attended a meeting held in the office of Beatrice Tylutki, the Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection. Attending the meeting were Director Tylutki, Hank Jatczak, Deputy Director, Jack Van Dalen, Deputy Attorney General and Robert Meagher, the deponent herein, Gary A. Maham of Scientific, Mrs. Jerry Chafin, Vice President of Scientific, Richard Paluso, P. E. and Ted Schwartz, Esquire.

3. In part, the discussion centered around how leachate being generated at Kin Buc Landfill, Edison, New Jersey, was to be treated and disposed of. Director Tylutki emphatically stated that it could not be disposed of in New Jersey. She stated, "Take it to Pennsylvania."

ROBERT MEAGHER
Robert Meagher

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF NORMAN ROSENFARB.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, Norman Rosenfarb, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the Sales Representative of R & R Sanitation Company, Box 422, R. D. #4, Dover, New Jersey 07801.

2. R & R Sanitation Company hauls domestic and industrial waste collected within the State of New Jersey.

3. We dispose of wastes for M & M Candy Company which wastes are food processing wastes. These wastes were disposed through Ocean Disposal in Kearney, New Jersey, until their permit expired for ocean dumping. Next, those wastes were disposed of through the landfill facility at Kin Buc until that facility was closed.

4. Thereafter, these wastes were disposed of at Grows Landfill in Morrisville, Pennsylvania, and some other sites. Grows Landfill became unavailable for dumping for us in the first two weeks of April, 1977.

5. As a result of the unavailability of Grows Landfill in Pennsylvania, I telephoned Dr. Ron Buchanan at the Hazardous Waste Section of the Department of Environmental Protection and requested from him suggestions as to where we might continue disposing of the wastes which we had. I suggested at that time Ocean County Landfill in New Jersey or Southern Ocean County Landfill in New Jersey. Dr. Buchanan suggested Chrins in Easton, Pennsylvania, as a site for the dumping. Dr. Buchanan did not suggest any sites in the State of New Jersey for the dis-

posal of these wastes. As I had never heard of Chrins, I contacted them with the result that we began disposing of wastes there which we continue to do to this date.

6. Subsequent to that telephone call, Dr. Buchanan and I spoke again on the telephone at which time he indicated that Ocean County Landfill and Southern Ocean County Landfill would not be appropriate sites for any of our disposal of wastes as there had been a meeting with Beatrice Tylutki, Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection, at which time it was decided that the policy of the Department would be that there would be no new streams of waste permitted at landfill sites in the State of New Jersey.

NORMAN ROSENFARB
Norman Rosenfarb

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF RONALD KILEY.
(May 6, 1977)

STATE OF NEW JERSEY
COUNTY OF PASSAIC } *ss.:*

Ronald Kiley, being sworn upon his oath, according to law, deposes and says:

1. I am Operations Manager for Gaess Environmental Services Co. at their Passaic plant, in Passaic, New Jersey.

2. I am responsible for dispatching our collection vehicles for servicing the disposal needs of industry in New Jersey.

3. Since the closing of the Kin-Buc landfill in Edison, New Jersey, Gaess Environmental Services Co. has been compelled to transport solid and liquid waste collected from New Jersey industries hereinafter named to disposal facilities in the State of Pennsylvania and New York State because there is no other available facility in New Jersey.

4. The following are some of the industries from which we haul solid and liquid waste to these disposal sites.

Hoffman La Roche
F. M. C. Corporation
Union Carbide
R. C. A.
Stauffer Chemical
Diamond Shamrock
ICI United States
Western Electric
BASF Wyandotte

There are at least twenty-five other companies of various sizes which we service.

5. These wastes are primarily chemical wastes.

RONALD KILEY
Ronald Kiley

Sworn to and Subscribed before me this 6th day of May, 1977.

PETER W. RADICE
Peter W. Radice
Notary Public of N. J.

PETER W. RADICE, JR.
Notary Public of New Jersey
My Commission Expires April 4, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CITY OF PHILADELPHIA, et al.
Petitioners

v.

STATE OF NEW JERSEY, et al.
Respondents.

AFFIDAVIT OF VINCENT A. SUOZZI.

(July 6, 1977.)

STATE OF NEW YORK
COUNTY OF NASSAU } *ss.:*

VINCENT A. SUOZZI, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Mayor of the City of Glen Cove, New York, one of the above-named plaintiffs and have personal knowledge of the matter herein contained.

2. For the past 5 years Glen Cove has contracted with Jamaica Ash and Removal Company for collection and disposal of the solid waste generated within Glen Cove. This company has been disposing of this waste in New Jersey simply because there is no facility available on Long Island. All of the landfills operating around Glen Cove are municipally owned and operated for their exclusive use.

3. I have discussed this disposal problem with Mr. Fazzini, Vice President of Jamaica Ash and Removal Company and I am satisfied that closing of New Jersey to out-of-state waste will leave our collector without a source for disposal. As solid waste accumulates in Glen Cove, a serious health hazard is anticipated. There is no solace in knowing Glen Cove may have a contractual claim against the collector.

4. Three years ago we commenced work on a long-term solution to our solid waste problem. Glen Cove needed a new sewer plant and our plan was to incorporate as a second phase an incinerator for sludge that would also incinerate municipal solid waste. Environmental Protection Agency has approved the sewer plant and construction will actually start next month. The use of an incinerator for sludge and municipal waste is unique and because of this uniqueness we have received not only EPA approval but a federal commitment for funding. The engineering for this incinerator is complete. We are now negotiating with the State of New York for supplemental funding. Specifications are being prepared. It is anticipated that this incinerator will be in construction and operation in two to two and one-half years from now. For the time being, therefore, we are utterly dependent upon New Jersey.

VINCENT A. SUOZZI
Vincent A. Suozzi

Sworn to and Subscribed before me this 6th day of July, 1977.

V. ALLAN BAUSO
V. Allan Bauso
Attorney at Law
Admitted to Practice
in New York State

AFFIDAVIT OF RICHARD A. PELUSO.
(June 29, 1977)

STATE OF NEW JERSEY
COUNTY OF BERGEN } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Civil Engineering, majoring in Environmental Engineering and have completed course work toward a doctor's degree in said field.

3. I am Vice-President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. On January 16, 1974, January 31, 1974, November 25, 1975, and March 30, 1977, I executed affidavits filed in this action. These affidavits were subsequently filed in the Supreme Court of the United States in conjunction with plaintiffs then motion for a stay. The facts therein stated remain unchanged except to the extent they are supplemented by this affidavit. Copies of these affidavits are attached.

5. On behalf of plaintiffs who are engaged in private enterprise and others, I do extensive work with the Department of Environmental Protection. I am familiar with the Department of Environmental Protection public records. I have made inquiry in the Bureau of Solid Waste Management of the Department of Environmental Protection whether they had any records indicating the acreage of land in New Jersey suitable and available as potential sanitary landfill sites. I have been advised that no such survey has ever been made and that the Department

possesses no specific knowledge of the amount or location of land suitable and available for future sanitary landfill use in the state. The only census records this Department maintains concerning sanitary landfills are those existing and those in the application process. As an engineering specialist in engineering design of sanitary landfills, I have spent considerable time the last five years in New Jersey travelling the length and breadth of the state by air and by car. In my affidavit of November 25, 1975, I stated that there is extensive acreage in need of land reclamation that is suitable, from an environmental point of view, for sanitary landfills should the economic need for same arise. No affidavits opposing this viewpoint has ever been filed on the matter by the Bureau of Solid Waste Management of the Department of Environmental Protection. It is now well recognized that the many problems that can emanate from disposal of solid or liquid waste on land are controllable. The regulations of the New Jersey Department of Environmental Protection and Environmental Protection Agency reflect this. Sanitary landfills are being designed and operated that will avoid degradation of the environment and will avoid impairing public health.

6. The greatest cost factor in solid waste disposal today is hauling the refuse from the place of origination to the disposal facility. The time consumed in transporting is affected by mileage, road conditions, and traffic congestion.

7. Kinsley's Landfill in Gloucester County, New Jersey, one of the plaintiffs herein, is comprised of approximately 335 acres. Approximately 70 acres are currently in operation as a sanitary landfill. The environmental controls that have been designed for the entire landfill of approximately 335 acres are estimated to cost in excess of $1,000,000.00. From my observations, it is my opinion

that at least 75 percent of the volume going into this landfill comes from Philadelphia.

The Mount Holly Sanitary Landfill, located in the towns of Mount Holly, Easthampton, and Lumberton, Burlington County, New Jersey, is in the process of installing environmental controls which will also cost in the order of $1,000,000.00. Over 75 percent of the volume going into this landfill comes from Philadelphia.

8. The Parklands Reclamation Project located in Bordentown Township, County of Burlington, New Jersey, consists of approximately 90 acres and has recently received an approved registration with extensive environmental controls. The heavy equipment necessary for the operation of this landfill has an approximate cost value of $600,000.00.

9. The type of environmental controls that are incorporated into modern sanitary landfills and the problems they are designed to correct are:

(a) Gas venting systems—To disburse methane gas so it will not accumulate.

(b) Aeration devices and lagoons—To evaporate and minimize leachate problems.

(c) Impermeable liners—To protect underground aquifers from leachate contamination.

(d) Fencing—To control scattering of debris.

(e) Modern compaction equipment—To increase density of solid waste.

(f) Perimeter collecting drains—To handle surface runoffs for control of possible flooding.

(g) Spraying—Odor control.

(h) Spraying and extermination—For rodent control.

(i) Monitoring wells—To make certain leachate systems are working properly.

(j) Gas monitoring wells—To make certain that methane gas venting systems are functioning.

(k) Other physical and chemical treatment processes —For leachate treatment and disposal.

10. The commercial collection and use of methane gas for heating and power generation is now becoming practical and feasible.

11. Sanitary landfills properly designed and operated in accordance with regulations of the New Jersey Department of Environmental Protection, permit conversion of mined, worthless lands to beneficial uses, the most acceptable being recreational.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 29th day of June, 1977.

STEPHINI VOZZA
Stephini Vozza
Notary Public, State of New Jersey
Residing in Passaic County
My commission expires March 30, 1982

AFFIDAVIT OF RICHARD A. PELUSO.
(March 30, 1977)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. A sanitary landfill is recognized by authorities and knowledgeable experts in the field of solid waste management as an environmentally sound method of solid waste disposal and a vital tool for land reclamation. The United States Environmental Protection Agency, in its 1976 publication entitled "Decision-Makers Guide in Solid Waste Management (SW-500)", states on page 109, "Every community needs access to a sanitary landfill for environmentally safe disposal of its solid waste." The solid waste management rules of the Bureau of Solid Waste Management of New Jersey require the operation of sanitary landfills in an environmentally sound manner (N. J. A. C. 7:26-1 et seq.).

5. Sanitary landfills are developed in lifts of 12 feet. There is no limitation in the regulations of the Bureau of Solid Waste Management concerning the number of lifts. This depends entirely upon the design of the landfill. From my wide experience in designing and supervising landfills in New Jersey the average elevation is in excess

of 50 feet. Operating a sanitary landfill to a depth of 20 feet would not be typical. Consequently, Mr. Lind's statement in paragraph 2 of his affidavit that almost one square mile of landfill area has been used since 1974 is a gross exaggeration.

6. I was the consulting engineer for MAC Sanitary Landfill. Contrary to Mr. Lind's averment in paragraph 5, this landfill was *not* closed because "of environmentally (including odor problems) and aesthetic considerations." This landfill was closed simply because it had reached its capacity in accordance with the engineering design on file with the Department of Environmental Protection.

7. The sanitary landfill proposed for the abandoned Church Brick clay mines in Bordentown, Burlington County, referred to in paragraph 5 of the Lind affidavit, has been designed by the firm with whic[illegible] associated and I am fully familiar with it. As a result of many years of clay mining the land is presently useless. Without land reclamation through a sanitary landfill this acreage will forever lie fallow.

8. Upon information and belief the D. E. P. has never undertaken a survey of suitable and available landfill sites in New Jersey. It is common knowledge that there are many hundreds of acres of land in New Jersey that have been scarified in mining operations. The most sensible and environmentally sound manner of reclaiming this land is through sanitary landfills.

9. Mr. Lind, in paragraph 6 of his affidavit, asserts that landfills increase health hazards by generating leachate and methane gas, attracting rodents and causing fires. The solid waste management rules of the Bureau of Solid Waste Management which Mr. Lind is charged with the responsibility of enforcing, clearly and emphatically prohibit the operation of sanitary landfills that permit leachate to escape into the underground acquifers or cause any of the health hazards that he has enumerated. The solid waste management rules mandate that there be no fires, provides for rodent control and the proper disbursement of methane gas. However, the commercial use of methane gas generated by landfills is practical and in use in various parts of the United States. In New Jersey, the Edgeboro disposal landfill uses its methane gas for commercial purposes.

10. Completed sanitary landfills have been used for many purposes. Recreational uses such as parks, playgrounds and golf courses have been most predominant, however, there are many instances of shopping centers, post offices, airports, etc. having been built on land reclaimed by sanitary landfills. The United States E. P. A. has documented these uses in many of its publications.

11. It is within the control of the Bureau of Solid Waste Management of the D. E. P. of the State of New Jersey to eliminate "bad" landfills that Mr. Lind alleges exist in New Jersey. Simply eliminating the disposal of out of state waste will not convert a "bad" landfill into a good one. Enforcement by the Bureau of Solid Waste Management of its rules will eliminate any "bad" landfills. New Jersey can then enjoy the benefits of land reclamation through sanitary landfilling.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 30th day of March, 1977.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

AFFIDAVIT OF RICHARD A. PELUSO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach*, 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.° This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

°Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

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No.

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

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AFFIDAVIT OF MARVIN MAHAN.

(July 6, 1977.)

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STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc., a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. Attached hereto is an affidavit filed with the Supreme Court of New Jersey and executed by me on November 25, 1975. All of the facts therein stated remain true except to the extent herein modified.

3. Kinsley's Landfill, Inc. and MAC Sanitary Landfill, Inc. are wholly owned subsidiaries of Scientific, Inc.

4. MAC Sanitary Landfill, Inc. having reached its designed capacity has been recently closed.

5. Kinsley's Landfill operates in Gloucester County, New Jersey. It owns approximately 335 acres, 65 of which are presently being used as a sanitary landfill under a certificate of registration approved by the New Jersey Department of Environmental Protection and a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

6. On July 11, 1976, the engineering design for use of the balance of the acreage as a sanitary landfill was filed with the Department of Environmental Protection. It is anticipated that in due course registration for this additional acreage will be received. This expansion is predicated upon a continued sale of landfill space to Pennsylvania disposers.

7. The life expectancy of the section presently being operated is 2½ years.

8. Over 80% of the volume of refuse annually disposed of at this facility originates in the Philadelphia area. This company has a contract with the City of Philadelphia and it also serves many private haulers from the Philadelphia area. This company has a gross annual income of about $1,500,000.00. The costs of operating this facility are geared to the continued sale of landfill space to the City of Philadelphia and the private out-of-state haulers. Not only could this company not continue operations absent out-of-state sale of landfill space but in closing will suffer large financial losses. There is not a sufficient market available in New Jersey which would be attracted to this

area to off-set the losses occasioned by the loss of revenues coming from the Pennsylvania buyers of landfill space.

MARVIN MAHAN
Marvin Mahan

Sworn and subscribed to before me this 6th day of July, 1977.

FLORENCE W. EDWARDS
Florence W. Edwards
A Notary Public of New Jersey
My Commission Expires May 29, 1981

AFFIDAVIT OF MARVIN MAHAN.

(November 25, 1975.)

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

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DOCKET NO. A-82-74

September Term 1974

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Civil Action

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CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

———

Affidavit.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc. a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. MAC Sanitary Landfill, Inc. and Kinsley's Landfill, Inc. which operate sanitary landfill facilities in Gloucester County, New Jersey are wholly owned subsidiaries of Scientific, Inc.

3. MAC Sanitary Landfill, Inc. leases approximately 80 acres of land, of which approximately 36 acres are used for sanitary landfill purposes. Pursuant to engineering plans and designs heretofore filed with the New Jersey Department of Environmental Protection, it is anticipated at least 500,000 tons of solid waste can be disposed of at said sanitary landfill facility.

4. The site owned and operated by Kinsley's Landfill, Inc. is comprised of approximately 335 acres of land of which approximately 65 acres are presently used for sanitary landfill purposes. Preliminary elevation plans have been filed with the New Jersey Department of Environmental Protection for the entire remaining portion of the tract, and engineering plans and designs are in the process of being completed. It is presently anticipated that not less than 15,000,000 tons of solid waste can be disposed of at said landfill site.

5. In order for Kinsley's Landfill, Inc. to operate a sanitary landfill facility upon the aforesaid 65 acre tract,

it was required by the Department of Environmental Protection that certain environmental controls be provided for the site. Said evironmental controls cost approximately $500,000, almost all of which has been spent by Kinsley's.

6. At the time the aforesaid 335 acres were purchased for operation of a sanitary landfill by Kinsley's Landfill, Inc., and environmental controls were made upon the 65 acre portion of said tract, an agreement was reached with the City of Philadelphia for the disposal of solid waste originating in said City. The aforesaid 335 acre tract would not have been purchased and the environmental improvements thereto would not have been made in the absence of said agreement.

7. MAC and Kinsley presently have a contract with the City of Philadelphia for a minimum of 800,000 cubic yards (200,000 tons) and a maximum of 1,200,000 cubic yards (300,000 tons) which runs for 10 years and is of vital importance to the ability of MAC and Kinsley's to continue in operation.

8. In a study prepared for Gloucester County by Roy Weston, a consulting engineer, it was estimated that the total domestic solid waste generated in Gloucester County for the year 1975 would be 95,000 tons and that the projected domestic solid waste to be generated in said County during 1985 would be 150,000 tons.

9. There are presently 12 sanitary landfill facilities operating in Gloucester County, New Jersey.

10. Both the MAC and Kinsley landfills were planned and developed to handle primarily solid waste from Pennsylvania and the City of Philadelphia. At present, approximately 80 per cent of the total volume originates from either Pennsylvania or the City of Philadelphia. In the

event the out-of-state ban is enforced, it will be necessary to either close one or both of the landfills from lack of volume. In addition, it will be necessary to apply to the Public Utility Commission for a substantial increase to make up for the loss of revenue that will result from the exclusion of out-of-state refuse. Without such a rate increase, the landfill will not be able to operate.

MARVIN MAHAN
Marvin Mahan

Sworn to and Subscribed before me this 25th day of November, 1975.

ARTHUR MEISEL
Arthur Meisel
Atty. at Law of N. J.

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

—

No.

—

CITY OF PHILADELPHIA et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

AFFIDAVIT OF LEO F. HUGHES.

(July 6, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill Development Company operates a sanitary landfill in Burlington County New Jersey. It operates under a certificate of approved registration issued by New

Jersey Department of Environmental Protection (D. E. P.) and also has a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

3. The Landfill consists of 200 acres and is located in three municipalities, namely, Mount Holly, East Hampton and Lumberton Township.

4. Landfill Development Company commenced operations of the sanitary landfill at this site in 1969. For many years prior to this date, the City of Mount Holly operated a dump on this site and disposed thereon its municipal solid waste.

5. Many sections of this site, particularly the East Hampton section, had been used by the previous owners for sand and gravel mining.

6. In 1972, Landfill Development Company entered into a long term contract with the City of Philadelphia. Many private haulers from Philadelphia serving industrial and commercial establishments also used this landfill. The gross income from out-of-state users is in excess of $700,000.00 a year. Over 80% of the volume of refuse disposed at this landfill comes from the Philadelphia area.

7. This landfill also serves New Jersey communities as well as private haulers from New Jersey.

8. During the many years that Mount Holly operated the dump at this site there was no regulatory agency in New Jersey charged with protecting the environment. Consequently, many thousands of tons of waste of all descriptions were buried at this site during this period creating various environmental problems and health problems

primarily water pollution. The present operator, Landfill Development Company, has entered into an agreement with the New Jersey Department of Environmental Protection to upgrade this landfill in an effort to correct and eliminate the problems of the past. Landfill Development Company has committed itself to install environmental controls that will cost in excess of $1,000,000. Many of these controls are already installed. The controls are designed to eliminate aquifer contamination.

9. In addition to the costs of environmental controls, the economics of operating a landfill at this site requires the capital investment of $500,000.00 for heavy equipment, annual payroll in the neighborhood of $137,000.00 a year, maintenance and repairs of approximately $75,000.00 a year. There are many other costs of significance such as debt handling, insurance, engineering and engineering consultation, real estate taxes and the many other costs inherent in business operations of this size.

10. There is absolutely no way that this company can finance these necessary environmental controls and operate the landfill without the City of Philadelphia contract and the private Pennsylvania haulers. In relation to the overall costs of maintaining the site and operating under the conditions outlined above, the income received from New Jersey sources is so insignificant that this company would be forced to close the site. The section of Burlington County on which this site is located is relatively rural. There is no untaped potential market in New Jersey to make up for the loss of the sales of landfill space to Pennsylvania customers.

11. The life expectancy for this sanitary landfill at present annual volume is 20 to 25 years.

12. Department of Environmental Protection frequently inspects this landfill and recognizes it to be operated in an environmentally sound fashion.

LEO F. HUGHES
Leo F. Hughes

Sworn and subscribed to before me this 6th day of July, 1977.

ARTHUR MEISEL
Arthur Meisel
Att'y-at-Law of N. J.

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } ss.:

LEO F. HUGHES, 3rd, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill and Development operates a sanitary landfill in Burlington County, N. J. and is so certified by the

Public Utility Commission and Department of Environmental Protection.

3. Approximately 75% of the volume of refuse disposed of at this site comes from the City of Philadelphia.

4. This landfill also serves several New Jersey communities as well as private haulers in New Jersey who serve industry and commerce located in this state.

5. The operation of this landfill in compliance with the Department of Environmental Protection regulations requires a large dollar volume of business. Without the benefit of the Philadelphia contract this sanitary landfill operation will not be economically feasible.

6. It is likely that Landfill and Development Company will be unable, for financial reasons, to continue operating a sanitary landfill facility in the event it loses the volume of solid waste generated by the City of Philadelphia.

LEO F. HUGHES, 3rd
Leo F. Hughes, 3rd

Sworn to and Subscribed before me this 18th day of November, 1975.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires March 16, 1977

AFFIDAVIT OF MILTON BERKES.

(January 29, 1974.)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN } *ss.:*

Milton Berkes being duly sworn upon his oath according to law deposes and says:

1) I am a Legislator from the 140th Assembly District of the Commonwealth of Pennsylvania elected from Bucks County.

2) I have personal knowledge of the matters contained herein.

3) I have, this twenty-ninth day of January, 1974, introduced into the House of Representatives of the Commonwealth of Pennsylvania a bill designated as House Bill No. 1831, a true copy of which is attached hereto and made a part hereof.

4) The intent of this legislation is to retaliate against any state that refuses to accept solid or liquid waste, for treatment or disposal, that originates within the Commonwealth of Pennsylvania.

MILTON BERKES
Milton Berkes

Sworn and subscribed to before me, a notary public of the Commonwealth of Pennsylvania this 29th day of January, 1974.

EUNICE F. JOHNSON
NOTARY PUBLIC
My Commission Expires Sept. 13, 1976
Hershey, Pa. Dauphin County

AN ACT

Amending the act of July 31, 1968 (P. L. 788, No. 241), entitled "An act providing for the planning and regulation of solid waste storage, collection, transportation, processing and disposal systems; requiring municipalities to submit plans for solid waste management systems in their jurisdiction; authorizing grants to municipalities; requiring permits for operating processing or disposal systems; imposing duties on and granting powers to municipalities; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies, prescribing penalties, and making an appropriation," prohibiting the treatment and disposal within the State of solid waste collected from a state that does not accept waste from this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6, act of July 31, 1968 (P. L. 788, No. 241), known as the "Pennsylvania Solid Waste Management Act," is amended by adding a clause to read:

Section 6. Powers and Duties of the Department.—The department shall have the power and its duty shall be to:

• • •

(10) Develop methods to identify the source of any solid waste which is part of the process of a solid waste management system to prevent any solid waste collected from another state that does not accept solid waste from this Commonwealth from being processed as part of such solid waste management system.

Section 2. Section 7 of the act is amended by adding a subsection to read:

Section 7. Applications and Permits.—• • •

(f.1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 3. Section 9 of the act is amended by adding, before the last paragraph, a clause to read:

Section 9. Prohibited Acts.—It shall be unlawful for any person, municipality, county, or authority to:

• • •

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 4. This act shall take effect immediately.

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, et al.,

Appellants,

v.

STATE OF NEW JERSEY, et al.,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

Jurisdictional Statement Filed September 15, 1977.

Probable Jurisdiction Noted November 28, 1977.

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INDEX TO APPENDIX.

	Page
Relevant Docket Entries in the Superior Court of New Jersey Law Division	A1
Relevant Docket Entries in the Superior Court of New Jersey Appellate Division Division	A2
Relevant Docket Entries in the Supreme Court of New Jersey	A3
Relevant Docket Entries in the Superior Court of New Jersey Law Division	A5
Transcript of Oral Opinion of Trial Court	A6
Opinion of Superior Court of New Jersey, Chancery Division, in Companion Case *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J. Super.* 160, 316 A. 2d 711 (Ch. 1974)	A14
Opinion of New Jersey Supreme Court in *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451, 348 A. 2d 505 (1975)	A32
Opinion of Supreme Court of the United States in *Philadelphia v. New Jersey*, — U. S. — (1977)	A59
Opinion of New Jersey Supreme Court on Remand in *Philadelphia v. New Jersey*, — N. J. — (1977)	A62
State Statute Involved—*P. L.* 1973, *c.* 363, Approved January 2, 1974	A75
State Administrative Regulation Involved—N. J. A. C. 7:1-4	A77
Appellants' Complaint Filed in Trial Court	A82
Affidavit of Vincent Suozzi Dated January 10, 1974	A105
Affidavit of Samuel Hale Dated January 15, 1974	A108
Exhibit A	A110
Affidavit of David J. Damiano Dated January 16, 1974	A111
Affidavit of Richard Peluso Dated January 16, 1974	A115
Affidavit of Leo F. Hughes, 3rd Dated January 16, 1974	A118
Exhibit A	A123
Exhibit B	A125
Exhibit C	A127

INDEX TO APPENDIX (Continued).

Page

Order to Show Cause With Restraints A128
Affidavit of Arsen J. Darnay, Dated January 29, 1974 ..... A131
Affidavit of Milton Berkes Dated January 29, 1974 ..... A137
Affidavit of John P. Fazzio Dated January 30, 1974 ..... A140
Affidavit of David I. Bennett Dated January 30, 1974 ..... A143
Affidavit of Bernhardt V. Lind Dated January 30, 1974 ..... A145
Affidavit of Richard A. Peluso Dated January 31, 1974 ..... A167
Order Granting Interlocutory Injunction A169
Appellees' Answer to Complaint A171
Portion of Transcript of Deposition of Lino F. Pereira Taken on March 13, 1974 ..... A179
Motion for Summary Judgment A188
Excerpts From Brief of Appellants, State of New Jersey, Filed in the Appellate Division (Pages 17-18) A190
Excerpts From Brief Supporting Plaintiffs' Motion for Summary Judgment A191
Excerpts From Brief in Support of Defendants' Motion for Summary Judgment A192
Consent Order A194
Order Granting Plaintiffs' Motion for Summary Judgment ... A196
Notice of Appeal Filed by Appellees on April 23, 1974 ..... A198
Motion for Stay of Judgment A200
Affidavit of David J. Damiano Dated May 7, 1974 ..... A202
Denial of Motion for Stay of Judgment A204
Certification of Appeal by New Jersey Supreme Court A206
Affidavit of David J. Damiano Dated November 18, 1975 .... A208
Affidavit of Leo F. Hughes, 3rd Dated November 18, 1975 .. A210
Order of New Jersey Supreme Court Granting Stay of Judgment to Appellants on Emergency Basis A212
Application for Stay of Judgment and Other Relief to New Jersey Supreme Court by Appellants A214
Affidavit of David J. Damiano Dated November 24, 1975 ... A219

INDEX TO APPENDIX (Continued).

Page

Affidavit of Marvin Mahan Dated November 25, 1975 ..... A225
Affidavit of Richard A. Peluso Dated November 25, 1975 .... A229
Affidavit of Arthur Meisel Dated November 25, 1975 ..... A234
Affidavit of John P. Fazzio Dated November 25, 1975 ..... A236
Affidavit of Joseph Petruzzi Dated November 25, 1975 ..... A240
Letter Dated December 6, 1974 From Mayor, Borough of Runnemede to Acting Director, Division of Marine Services, New Jersey Department of Environmental Protection A242
Affidavit of Bernhardt V. Lind Dated December 8, 1975 .... A244
Exhibit "A" A257
Exhibit "B" A265
Exhibit "C" A274
Exhibit "D" A281
Exhibit "E" A283
Supplement to Respondents' Brief With Excerpts From Testimony of Mr. Carhart, January 17, 1973 ..... A287
Affidavit of Stephen Wassersug Dated December 5, 1975 .... A292
Affidavit of Wesley E. Gilbertson Dated December 5, 1975 .. A294
Order of New Jersey Supreme Court Denying Motion for Stay A297
Order of New Jersey Supreme Court Vacating Temporary Stay Effective December 31, 1975 ..... A298
Order of New Jersey Supreme Court Granting Motion for Remand A299
Order of Superior Court of New Jersey, Law Division, Dated December 19, 1975 ..... A300
Order of Mr. Justice William J. Brennan, Jr. Dated December 31, 1975 Granting Stay of Judgment A302
Notice of Appeal Filed January 9, 1976 ..... A303
Order of Mr. Justice William J. Brennan, Jr. Dated July 18, 1977 Granting Stay of Judgment A305
Notice of Appeal Filed July 22, 1977 ..... A307

INDEX TO APPENDIX (Continued).

	Page
Affidavit of Leo F. Hughes, 3rd Dated January 16, 1974	A310
Exhibit A	A315
Exhibit B	A317
Exhibit C	A319
Motion for Clarification or, in the Alternative, for Stay Pending Completion of Remand and for Expedited Briefing and Argument	A320
Order Dated April 4, 1977 Granting Motion for Acceleration, etc.	A321
Affidavit of Frank J. Kuserk Dated May 6, 1977	A322
Affidavit of Ray Rothschild Dated June 27, 1977	A324
Affidavit of Wilbur Henry Dated May 5, 1977	A326
Affidavit of Robert Meagher Dated May 5, 1977	A333
Affidavit of Norman Rosenfarb Dated May 5, 1977	A334
Affidavit of Ronald Kiley Dated May 6, 1977	A336
Affidavit of Beatrice S. Tylutki Dated May 17, 1977	A338
Affidavit of Ronald J. Buchanan Dated May 17, 1977	A341
Affidavit of Vincent A. Suozzi Dated July 6, 1977	A347
Affidavit of Richard A. Peluso Dated June 29, 1977	A349
Affidavit of Richard A. Peluso Dated March 30, 1977	A353
Affidavit of Richard A. Peluso Dated November 25, 1975	A356
Affidavit of Marvin Mahan Dated July 6, 1977	A361
Affidavit of Marvin Mahan Dated November 25, 1975	A364
Affidavit of Leo F. Hughes Dated July 6, 1977	A368
Affidavit of Leo F. Hughes, 3rd Dated November 18, 1975	A372
Affidavit of Milton Berkes Dated January 29, 1974	A374

RELEVANT DOCKET ENTRIES.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Date	*Pleadings*
1974	
Jan. 22	Complaint.
Jan. 30	Notice of Motion.
Jan. 30	Order as to restraints etc.
Feb. 4	Order grantnig Interlocutory Injunction.
Jan. 22	Order to show cause.
Feb. 13	Answer.
Feb. 19	Order to Intervene.
Mar. 11	Amended complt.
Mar. 21	Notice of Motion.
Mar. 27	Order for Summary Judgment.
Apr. 23	Notice of Motion.
Apr. 11	Order as to Hearing.
May 8	Order Denying Motion.
Aug. 6	(8) Affidavit.
Aug. 6	Copy of Affidavit.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Date	*Proceedings*
1974	
Apr. 23	NOTICE OF APPEAL.
May 8	1 copy of Trans.
July 9	Brief for Appl.: Appendix for Appl.
July 26	Notice of Motion for stay.
Aug. 8	Brief & Appendix in Opp.
Aug. 9	Brief & Appendix in Opp. (V. J. Dotoli).
Aug. 16	Order denying motion for stay; appeal shall be acceleratаed.
Aug. 21	Brief of Pltf-Respondent.
Aug. 23	Brief & Appx for Pltf-Intervenor Resp.
Sept. 5	Oral argument requested.
Oct. 15	Copy of order granting certification to Supreme Court.

SUPREME COURT OF NEW JERSEY

Date	*Proceedings*
1974	
Oct. 7	Order on Direct Certification & Consolidation with Hackensack Meadowlands Development Comm. v. Municipal Sanitary Landfill Authority (10,792). Received Ap. Div. Briefs. Brief of Appellant-Atty. Gen. Appendix of Appellants-Atty Gen. Brief of Plaintiffs-Respondents-Jamieson. Brief and Appendix for Plaintiff-Intervenor-Respondents. Dotoli, Esq.
Oct. 24	Letter of Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
1975	
Nov. 18	Opinion Mr. Justice Mountain 6-0 (J. Schreiber--out) 43 pp.
Nov. 18	Affidavits in support of temporary stay (Jamieson, Esqs.).
Nov. 20	Order granting temporary stay.
Nov. 26	Motion for stay and remand & Affts & Brief (Jamieson, McCardell, et al. Esq.).
Nov. 26	Motion for Stay (Vincent Dotoli, Esq.).
Dec. 5	Supplemental Affidavits (Jamieson McCardell, et al.).
Dec. 8	Brief in response to Motions & Affidavits. (Stephan Skillman, Esq.).
Dec. 10	Supplemental Letter—J. M. M. P & S.
Dec. 11	Order denying Motion For Stay M-433-75.
Dec. 11	Order granting Motion For Remand M-434-75.
Dec. 11	Order denying Motion For Stay M-436-75.
Dec. 31	U. S. Supreme Court Order Staying Judgment.

SUPREME COURT OF NEW JERSEY

Date	*Proceedings*
1977	
Feb. 28	U. S. Supreme Court Opinion Remanding To Supreme Court.
Mar. 14	Letter of F. R. P.—Atty. Gen to File Brief 3-15-77 City of Philadelphia will File Resp. Brief—3-31-77.
Mar. 15	Motion for Clarification or, in the alternative, for Stay pending Completion of Remand & for Expedited briefing & argument—Atty. Gen.
Mar. 18	Afft of Service—A. G.
Mar. 25	U. S. Supreme Court Mandate.
Mar. 30	Brief in opposition to Motion for Clarification, etc. & afft of Service—Jamieson, Esq.
Apr. 4	Suppl. Brief—Atty. Gen.
Apr. 19	Suppl. Brief—Jamieson, Esq. & Afft.
May 2	Brief of Defendants—Appellants—Atty Gen.
Apr. 4	Order granting motion for Acceleration, Setting Briefing Scheduled [sic] & Argument date (5-10-77). M-724/725-76.
May 3	Acknowledge of Service—Atty Gen.
May 6	Supp. Memorandum—Jamieson, Esq.
May 17	Answering Affts.—Atty Gen.
May 16	Synopsis of Questions & Responses Raised at the Hearing on the Remand.
June 20	Opinion reaffirmed as modified. Mountain, J. 19 pages 6-0.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Date	*Pleadings*
1975	
Dec. 22	Order dis. compl't (in part) etc.

SUPERIOR COURT OF NEW JERSEY.
LAW DIVISION—MERCER COUNTY.
DOCKET NO. L-15068-73 P. W.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF GLEN COVE, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK, LANDFILL & DEVELOPMENT CO., A N. J. CORPORATION, MAC SANITARY LANDFILL, INC., A N. J. CORPORATION, KINSLEY'S LANDFILL, INC., A N. J. CORPORATION, AND DE-LORENZO-INTERSTATE WASTE REMOVAL COMPANY, A N. J. CORPORATION, JOHN P. FAZZIO, INC., T/A JOHN P. FAZZIO LANDFILL COMPANY, AND CONTINENTAL VANGUARD, A N. J. CORPORATION,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Defendants.

ORAL OPINION.

Before:

HONORABLE GEORGE Y. SCHOCH, J.S.C.

Place:

Mercer County Courthouse,
Trenton, New Jersey.

March 25, 1974.

Appearances:

JAMIESON, WALSH, MCCARDELL, MOORE & PESKIN, by MR. HERBERT F. MOORE, and ARTHUR MEISEL, appearing on behalf of the plaintiffs, attorneys.

MR. VINCENT J. DOTOLI, appearing on behalf of defendant Fazzio, attorney.

WILLIAM F. HYLAND, Attorney General of the State of New Jersey, by MR. MARK L. FIRST, Deputy Attorney General, appearing on behalf of the defendant-State of New Jersey.

THE COURT: Well, there are three separate points raised by the motions or, I should say, by the motion and countermotion presented here. Each side makes this argument for summary judgment conceding that as to these particular issues there are no material issues of fact involved and so that the issues before the court at the moment are ripe for summary judgment.

The New Jersey Legislature passed a law, Public Law 1973, Chapter 363, which says in part, "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the state, except garbage to be fed to swine in the State of New Jersey, until the Commissioner shall determine such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state."

There were emergency regulations promulgated by the Commissioner, N. J. A. C. 7:1-4.1 and N. J. A. C. 7:1-4.2. The second regulation sets forth certain exceptions, descriptions of exceptions to the prohibition of solid or liquid waste, including separated waste material that is intended for re-cycling and certain other exceptions which are immaterial to the issue at hand.

Obviously the first matter that must be decided is whether the item of solid or liquid waste, we have been calling it garbage but it obviously includes more than just garbage, whether that item is a proper subject of interstate commerce. If it is not then there would be no prohibition against the state passing a law that prohibits the passage or importation of such item either through or into the state, since it would not violate the interstate commerce clause of the United States Constitution.

With reference to that point my attention has been called to two cases. One is the case of *Barnett v. A-1 Scavenger Service Co., Inc.*, a Missouri Court of Appeals case (1971) reported at 466 Southwestern 2d at 150. That case involved an interpretation of the Fair Labor Standards Act. A helper on a refuse truck who worked for an employer engaged exclusively in the collection and disposal of garbage and waste in the City of St. Louis, whether or not he was subject to the Fair Labor Standards provisions regarding minimum wage and overtime, because the employer collected waste from companies engaged in interstate commerce. At page 156 the court said, and I quote, "In the instant case it can scarcely be plausibly argued that the garbage and refuse after being collected by plaintiff entered the channels of interstate commerce, or the mere transportation of such garbage and other refuse for the purpose of disposing of it could be said to be commerce among the several states within the meaning of the Fair Labor Standards Act."

So we have the authority of that case which indicates that the transportation of trash and waste across the state line is not engaging in interstate commerce. On the other hand, there is a case of *U. S. v. Pennsylvania Refuse Removal Association*, at 242 Federal Supplement 794, U. S. District Court case for the Eastern District of Pennsylvania (1965) where the court said at page 799, "Defendants argue at various points in their brief that because trash itself is by definition a worthless commodity, it cannot be the subject of 'trade or commerce' as those terms are used in the Sherman Act. That argument misses the point. Here, the relevant subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the words 'trade or commerce' as used in the Act, the defendant's position has no merit." And on appeal to the U. S. 3rd Circuit Court reported at 357 Federal 2d, 806 (1966), the 3d Circuit Court said at page 808, "From the record we are satisfied that the factual holding of the trial judge that 'the hauling and disposing of refuse was an integral part of the refuse removal business' is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state is a vital element of the one business operation which plainly is a proper subject of interstate commerce."

Then there is a citation of *Hoke v. U. S.*

Then we have the case of *U. S. v. Bishop Processing Company*, U. S. District Court, District of Maryland (1968) 287 Federal Supplement 624, which I think could be analogized to our case. In the Bishop case the question was whether a business or factory that polluted the air and that air pollution, malodorous pollution obviously affected business conditions and property values in the neighboring state when the wind blew the smell and pollutants across the state line. One of the questions that had to be decided was whether the Clean Air Act covered this activity, that is, whether or not movement of the air pollutants across state lines constituted interstate commerce. And the District Court in Maryland decided, at page 629, that it did, saying, "The movement of pollutants across a

state line is a proper jurisdictional basis for the provisions of the Act relating to the abatement of interstate air pollution. Such movement of pollutants across state lines constitutes interstate commerce subject to the power granted the Congress by the Constitution to regulate such commerce."

From my analysis of the cases that I have just cited I think that the proper viewpoint to accept is that of the 3d Circuit that the transportation of waste across the state line is a subject of interstate commerce and, therefore, subject to the controls of Congress in accordance with the interstate commerce laws. However, that is not dispositive of the problem. The plaintiff suggested the second point that the Federal Government has pre-empted this field, and when I say this field I mean the field of prohibition of interstate movement of solid waste for either treatment or disposal.

I prefer to decide the problem on the basis of discrimination rather than on the theory of pre-emption because I think the issue is more clearly defined when we consider discrimination. I have already read certain portions of the federal code. I will refer to them again. 42 U. S. C. A. 3254. Let me read this in full. "The secretary shall encourage cooperative activities by the states and local governments in connection with solid waste disposal programs; encourage, where practicable, interstate, interlocal and regional planning for, and the conduct of, interstate, interlocal and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."

In Section 3251 there are five parts to subsection (b) setting forth the purposes of this particular law, all of which talk about assistance, technical advice, training

grants, et cetera. None of which seems to me indicate the type of pre-emption that I feel would be required in order to find the Federal Government has pre-empted this field in the fashion that the plaintiffs suggest and to arrive at the decision the plaintiffs suggest.

So we come to the question of whether or not this statute passed by the Legislature of New Jersey which, as I have already indicated, I find involves material which is the subject of interstate commerce, whether the statute discriminates against interstate commerce to the extent that it should be declared unconstitutional. I immediately concede that I am aware of the cases which hold that there is a strong presumption that the statute is constitutional and the legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. Further, to declare a statute unconstitutional is a judicial power to be delicately exercised, quoting from *Harvey v. Essex County Board of Freeholders*, 30 N. J. 381. The Court in the case of *Supermarket General v. Sills*, 93 N. J. Superior, 326 (Chancery Div. 1966) cites a quotation from the U. S. Supreme Court case of *Head v. New Mexico Board of Examiners* at page 345. The New Jersey Court says, "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. State regulation based on the police power which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."

As Judge Schreiber said in the case of *Hackensack Meadows Development v. Municipal Sanitary Landfill Authority*, a Chancery Division slip opinion dated February 13, 1974, page 12 of that slip opinion, "State regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce."

I am aware of the long line of cases that deal with the transportation of deleterious substances. They are listed in *Baldwin v. Seelig*, 294 U. S. 511 (1934), opinion of Mr. Justice Cardozo, at page 525, 7 Lawyers Ed., 1039, which recites some of the cases which have upheld the statutes regulating the importation of unhealthy cattle, decayed foods. Mr. Justice Cardozo says, "Things such as these are not proper subjects of commerce (and notes) there is no unreasonable interference when they are inspected and excluded."

I think the situation is different in this case before me and I see a relationship between the natural gas cases and this case. Some may say it's a strained reason but the natural gas cases that I refer to are *Pennsylvania v. West Virginia*, 262 U. S. 553, and *West v. Kansas Natural Gas Company*, 221 U. S. 229. Each of those cases, the so-called home state attempted to prevent the exportation of one of its natural resources and the statutes were struck down as unconstitutional in derogation of the free flow of commerce, that it is Congress' prerogative to control and not the state.

If we consider, as I do, that the purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural resources, the land, the availability of the land will be prolonged or extended or used less quickly. I don't see any difference between a state being prevented from prohibiting exportation of natural gas than the state being prevented from prohibiting the importation of something that will in effect use one of the state's natural resources.

Therefore, I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional.

You will prepare an order, Mr. Moore?

MR. MOORE: Yes, sir.

(End)

COURT REPORTERS CERTIFICATION.

I, ANTHONY DI STEFANO, one of the Official Court Reporters of the Superior and County Courts of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken by me in the above entitled matter.

ANTHONY DI STEFANO
Anthony Di Stefano

Dated: March 28, 1974.

[127 *N. J. Super.* 160, 316 A. 2d 711 (Ch. 1974)]

[160]

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION AND STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLAINTIFFS, *v.* MUNICIPAL SANITARY LANDFILL AUTHORITY, A JOINT VENTURE OF WILLIAM A. KEEGAN, INC., RECLAMATION AND IMPROVEMENT CO., PETER ROSELLE & SONS, INC., AND DELAWARE SANITARY CO., DEFENDANTS, AND CITY OF YONKERS, NEW YORK, DEFENDANT-INTERVENOR.

Superior Court of New Jersey
Chancery Division
Decided February 13, 1974.

• • •

[162]

Mr. Mark L. First, Deputy Attorney General, for plaintiffs (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

Mr. David Samson for defendants (*Messrs. Lieb, Wolff & Samson,* attorneys).

Mr. Eugene J. Fox, of the New York Bar, Corp. Counsel for City of Yonkers, pro hac vice for defendant-intervenor (*Messrs. Schapira, Steiner & Walder,* attorneys).

SCHREIBER, J. S. C. The Hackensack Meadowlands Development Commission (HMDC) and the State of New Jersey, Department of Environmental Protection (DEP),

seek to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site located within

[163]

the Hackensack Meadowlands District any solid wastes originating from or collected outside the territorial limits of New Jersey. Both HMDC and DEP had adopted regulations, effective September 1, 1973 and August 31, 1973, respectively, which prohibited such disposal.

An *ad interim* restraint, consented to by defendant, had been entered pending determination of the request for a permanent injunction. On the return date of the order to show cause defendants answered by challenging the constitutionality of the regulations and the Waste Control Act, *N. J. S. A.* 13:1I-1 *et seq.* The hearing was adjourned to allow plaintiffs time to respond to the challenges. In the meantime the City of Yonkers, New York, whose refuse was being deposited on the MSLA site, moved for and was granted leave to intervene as a party defendant. No testimony was taken at the hearing. The parties relied on affidavits and the transcript of proceedings taken before the Hackensack Meadowlands Commission on June 18, 1973.

MSLA has made a three-fold attack. It contends that (1) the Waste Control Act, regulation *N. J. A. C.* 7:26-1.5 promulgated thereunder, and certain regulations of HMDC, namely, *N. J. A. C.* 19:7-1.1(g) and (h), are invalid, arbitrary and unreasonable; (2) the procedure followed by DEP in promulgating its rule, *N. J. A. C.* 7:26-1.5, violated due process of law, and (3) all the above designated regulations and the Waste Control Act must fall because they violate Article 1, Section 8, paragraph 3 (the Commerce Clause) and Article 4, Section 2 (the Privileges and Immunities Clause), of the U. S. Constitution.

I

The Waste Control Act, *N. J. S. A.* 13:1I-1 to 8, recites that the Legislature found that the disposal of wastes generated or collected outside the State poses a threat to the quality of New Jersey's environment and that the Commissioner of Environmental Protection was empowered to create

[164]

regulations prohibiting the "landfill of solid waste" and the "disposal of liquid wastes" within the State which originated or were collected outside New Jersey. The Commissioner adopted Regulation *N. J. A. C.* 7:26-1.5, effective August 31, 1973, which reads as follows:

> Out of State waste
>
> (a) No person engaged in the collection of solid or liquid wastes shall dispose of any solid or liquid wastes which originated or were collected outside the territorial limits of this State in sanitary landfills in the Hackensack Meadowlands District.
>
> (b) No person owning or operating a sanitary landfill within the Hackensack Meadowlands District shall accept for disposal in such sanitary landfill any solid or liquid wastes which originated or were collected outside the territorial limits of this State.

Defendant contends that there is no basis for the Legislature's findings, that the regulation is invalid in the absence of a showing of a causal relationship between banning out-of-state garbage in New Jersey and a threat to its environment, and that the regulation is overly broad by banning all wastes. The statute and the administrative regulations are presumptively valid. *Harvey v. Essex County Board*

of Freeholders, 30 *N. J.* 381 (1959); *Burton v. Sills*, 53 *N. J.* 86 (1968); *State of Profaci*, 56 *N. J.* 346 (1970). Since one can reasonably and readily conceive of facts which would support the Legislature's findings and the Commissioner's regulations, the onus is on defendant to establish that the Legislature's and Commissioner's actions are arbitrary. *Consolidation Coal Co. v. Kandle*, 105 *N. J. Super.* 104 (App. Div. 1969), aff'd 54 *N. J.* 11 (1969); *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, 120 *N. J. Super.* 118 (App. Div. 1972); *Borden's Farm Products Co., Inc. v. Baldwin*, 293 *U. S.* 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934). Defendant's proof consisted of an affidavit of an engineer, Dennis L. Backus, and the transcript of proceedings before the Hackensack Meadowlands Commission held on June 18, 1973 with respect to its proposed regulations. The affidavit asserts that quantities of solid

[165]

wastes are used for construction purposes and that therefore a complete ban on disposal of out-of-state solid wastes is inappropriate. This conclusion does not necessarily follow because no reference is made to the amount of New Jersey refuse which is being used for landfill purposes, the limited amount of area available, and the environmental and public health impacts involved. Further, an affidavit of Lino Pereira, the Principal Environmental Engineer of DEP, asserts that sanitary landfills "present a pollution danger because they do not conserve or recover resources but bury them, and because they severely limit the future use of the land on which they are located." Additionally, he avers that sanitary landfills present a unique fire problem. An affidavit of Bernhard V. Lind, Acting Chief of the Bureau of Solid Waste Management in the DEP, asserts that of the 55,000 tons per week of solid waste being dis-

posed of in the Hackensack Meadowlands District, 10,000 tons originated outside New Jersey and there was an acute shortage of remaining landfill life located there. In view of all the foregoing, it is obvious that MSLA has not met its burden.

The same type of attack has been made upon regulations *N. J. A. C.* 19:7-1.1(g) and (h) of the HMDC. These regulations read as follows:

> 19:7-1.1(g). No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> 19:7-1.1(h). All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission, together with their applications, as provided in Sections 3 and 4 of this subchapter, a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment.

Defendant has made no showing that there was no basis for these regulations. The affidavits of William D. McDowell, Executive Director of HMDC, and George D. Cascino, its

[166]

Chief Engineer, disclosed that three surveys had been made to determine the volume and origin of solid waste disposed of in landfills in the Hackensack Meadowlands District.

The first disclosed that in 1968 some 30,000 tons were entering the District each week, of which 4,000 tons originated outside New Jersey. HMDC study in 1971 revealed that the weekly tonnage was 42,000, of which 5,000 emanated from outside the State. In April 1973 HMDC updated its study. At that time weekly tonnage had increased to 55,000, of which 10,000 came from sources outside of New Jersey. The Commission concluded that the sites had only three years of life remaining and that banning of out-of-state garbage would extend the landfill life some six months.

Under the Hackensack Meadowlands Development Act the Commission must provide disposal facilities for the New Jersey municipalities (totalling 118, according to plaintiffs) which had been utilizing the District. *N. J. S. A.* 13:17-10(a), (b) and (e). The affidavits point out that the Commission needs as much time as possible to develop a viable alternate method of disposal. One cannot reasonably contend that promulgation of the regulations under the totality of these facts and circumstances was arbitrary.

Defendant also argues that the HMDC regulations contravene *N. J. S. A.* 13:17-6(w) and 13:17-10(b) and (e) by failing to provide for disposal facilities for waste equal to levels at the time the statute was passed, which levels included out-of-state waste. *N. J. S. A.* 13:17-6(w) authorizes HMDC "to provide solid waste disposal facilities for the treatment and disposal of solid waste, as hereinafter provided." *N. J. S. A.* 13:17-10 reads:

> (a) Within 6 months of the effective date of this act the commission shall undertake and complete a survey of the district to determine the total amount of solid waste treated and disposed on a daily basis in the district as of the effective date of this act by persons *in this State*.

(b) The commission is hereby authorized, empowered and directed to guarantee that solid waste disposal facilities sufficient to treat and

[167]

dispose of the total amount of solid waste determined by its survey shall be available or be provided by the commission.

* * *

(e) The commission, in its discretion, may provide solid waste disposal facilities sufficient to treat and dispose of more than the total amount of solid waste determined by its survey, and may make such facilities available to persons other than those treating and disposing of solid waste in the district as of the effective date of this act. [Emphasis added]

Defendant reads these three sections together as guaranteeing continued use to *all* persons utilizing the disposal facilities in the Meadowlands at the time the act was passed. To interpret the statute in that way, however, one must delete the last three words in subsection (a). The inclusion of those words, "in this State," demonstrates that the Legislature was concerned about waste collected in New Jersey. If it intended to include all waste disposed of in the Meadowlands no matter where its origin, the phrase, "in this State" would not have been inserted, since, obviously, garbage dumped in the Meadowlands is dumped in this State. One must assume in interpreting a statute that the legislators would not insert a redundant or meaningless phrase. The only significance in these words is that the Legislature was interested in providing for disposal of New Jersey garbage—therefore, the remaining subsections, when referring to the "total amount of solid waste determined by

its [the Commission's] survey," are concerned with the total amount of garbage disposed of in the Meadowlands by *persons in this State, i.e.,* the total amount of New Jersey waste dumped in the Meadowlands. This is the only sensible interpretation. The concern of the New Jersey Legislature was to safeguard the area for New Jersey operations—not New York, Pennsylvania, or other jurisdictions. As Justice Jacobs wrote in *J. C. Chap. Prop. Owners', etc., Ass'n v. City Council,* 55 N. J. 86 (1969):

> When all is said and done, the matter of statutory construction here will not justly turn on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation. [at 100]

[168]

To the same effect: *State v. New Jersey National Bank and Trust Co.,* 62 *N. J.* 50 (1972). Defendant's contention that the regulations contravene the enabling statute is unsound for the statute mandates only that the Commission guarantee disposal facilities for New Jersey communities utilizing the landfill sites as of the effective date of the act.

II

Defendant attacks the procedure followed by the DEP in adopting *N. J. A. C.* 7:26-1.5, claiming that the failure to hold a hearing prior to adoption of the rule denied defendants due process. This contention has no merit. Plaintiff DEP caused the proposed regulation to be published in the *New Jersey Register* on July 5, 1973, with the statement that "interested persons may present statements or arguments in writing relevant to the proposed action on or before August 3, 1973." 5 *N. J. R.* 220(c). This notice was consistent with the Adminis-

trative Procedure Act, *N. J. S. A.* 52:14B-1, *et seq.*, and complied with *N. J. S. A.* 52:14B-4(a)(2), affording any interested person a reasonable opportunity to be heard. Defendant concedes that the act does not require a formal hearing and that it did not submit a statement or request a hearing. The uncontroverted statement in the affidavit of Mr. Lind is that no written statement or argument was received by DEP from any interested person. Under these circumstances there was no constitutional or statutory requirement that a hearing be held prior to the promulgation of the regulations. *Motyka v. McCorkle*, 58 N. J. 165 (1971).

III

There remains defendant's constitutional challenges. *i.e.*, that the DEP and HMDC regulations set forth above violate Article I, Section 8, paragraph 3 (Commerce Clause) and Article IV, Section 2 (Privileges and Immunities Clauses) of the U. S. Constitution. (Defendant has not

[169]

argued the Waste Control Act is unconstitutional). Defendant has not vigorously advanced its argument with respect to Article IV, Section 2, and it is not necessary to deal with that contention in depth. Suffice it to say there are serious infirmities in that position, such as the fact that it is not applicable to corporations and that it only applies where there is no substantial reason for the discrimination. *Paul v. Virginia*, 8 Wall. 168, 75 *U. S.* 168, 19 L. Ed. 357 (1868); *Hemphill v. Orloff*, 277 *U. S.* 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); *Toomer v. Witsell*, 334 *U. S.* 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Article I, Section 8, provides that "Congress shall have power * * * to regulate commerce * * * among the several States * * *." DEP and HMDC contend that garbage is

not a legitimate subject of trade or commerce and therefore not within the purview of the Commerce Clause. They rely upon a number of cases which recognize the power of a state to forbid the sale or importation of impure foods or such articles as would spread disease and pestilence and would be immediate causes of destruction of or injury to human health and life. A state's prohibition of the interstate transportation of diseased animals has been held not to contravene the Commerce Clause. *Clason v. Indiana*, 306 *U. S.* 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). Similarly, statutes forbidding the importation and sale of adulterated or injurious food or drugs have withstood constitutional attacks. *Crossman v. Lurman*, 192 *U. S.* 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904); *Price v. Illinois*, 238 *U. S.* 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915). In *Sligh v. Kirkwood*, 237 *U. S.* 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915), a Florida statute prohibiting the exportation of fruits which were unfit for human consumption was held valid. All these cases classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as nonmerchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease. The articles in-

[170]

volved had no useful purpose and were *per se* dangerous to health. On the other hand, refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity. In passing, it might be noted that some successful incinerator systems which create waste heat for power generation exist in Germany, the Netherlands, France and Switzerland. In the instant situation there is no prohibition against the transportation of out-of-state garbage in or through New Jersey or the dis-

posal of such refuse in New Jersey landfill sites located in places other than the Hackensack Meadowlands Districts.[1] It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal sites in the Hackensack Meadowlands District so that their life expectancy will be extended from 3 to 3½ years. In any event, the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce.

[171]

It is well established that a state may, in the exercise of its police power, enact legislation, even though it may affect interstate commerce, provided that the Federal Government has not preempted the field. *Gibbons v. Ogden*, 9 Wheat 1, 22 *U. S.* 1, 6 L. Ed. 23 (1824); *Missouri, Kansas & Texas Railway v. Haber*, 169 *U. S.* 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898); *Sligh v. Kirkwood, supra; Yellow Cab*

1. *L.* 1973, *c.* 363, enacted on January 2, 1974, authorizes the Commissoiner of the Department of Environmental Protection to determine when any solid or liquid waste which originated or was collected outside New Jersey may not be brought into the State. He has enacted regulations to that effect. *N. J. A. C.* 7:1-4.2. The effect of that statute and regulations is not before the court, although they may render this decision moot. It is interesting to note that the regulations adopted by the Commissioner except from the prohibition separated waste material intended for recycling or reclamation, municipal solid waste to be processed into reusable secondary materials, including fuel and heat, and "hazardous waste" which is to be treated in a solid waste disposal facility. The new law and regulations are concerned with the public health as well as environmental impact. The Commissioner's definition of "hazardous waste" would appear to fall into category of nonmerchantable material not subject to the Commerce Clause. *N. J. A. C.* 7:1-4.1.

Co. of Camden v. State, 126 *N. J. Super.* 81 (App. Div. 1973), certif. den. 64 *N. J.* 498 (1974).

The Federal Government has not adopted legislation dealing with the use of waste landfill sites. Further, the regulations and statute in question are clearly within the authority of the State's police power to conserve its landfill sites. It as been recognized that the dumping of garbage in a landfill is an unattractive and undesirable use of land and that it creates potential health and fire hazards. In *Shaw v. Byram Tp.*, 86 *N. J. Super.* 598 (App. Div. 1965), Judge (now Justice) Sullivan wrote:

> • • • Garbage or refuse is unsightly, smelly, attracts flies and rodents, and is a potential fire hazard. It is a prime source of disease and contamination. It has been called a necessary evil because it is a by-product of a civilized society. Ordinarily, some provision is made for its collection and disposal by the local government. However, problems of public health and welfare are involved, and no matter how carefully regulated, garbage dumps present some hazard to a community, the degree of hazard being directly related to the amount of garbage dumped. [at 602]

In *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, Judge Lynch approved the Commission's finding that:

> Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property*. Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [120 *N. J. Super.* at 122]

[172]

However, state regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce. In other words, the exercise of the police power may not be predicated on a method directed against interstate commerce. Plaintiffs concede that this is so. This nondiscrimination principle has been expounded in several United States Supreme Court decisions. In *Huron Portland Cement Co. v. Detroit*, 362 *U. S.* 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960), the City of Detroit had passed an ordinance which limited the permissible amount and density of smoke emissions from the boiler stacks of vessels while docked in the city. Huron Portland Cement Co., a Michigan corporation whose ships travelled among several states via the Great Lakes, challenged the code as an unlawful interference with interstate commerce. The court held that the ordinance was a valid exercise of the state's police power since it applied generally to *all* ships and did not discriminate in favor of local industry. Mr. Justice Stewart wrote:

> • • • State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702; Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 [PUR 1920E 18]; Milk Control Bd. v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 68 S. Ct. 358, 92 L. Ed. 455.
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> • • •

> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designed to better the health and welfare of the community. • • • We conclude that no impermissible burden on commerce has been shown. [at 448, 80 S. Ct. at 818].

In *S. C. Hwy. Dept. v. Barnwell Bros. Inc.*, 303 *U.S.* 177 58 S. Ct. 510, 82 L. Ed. 1522 (1938), Mr. Justice Stone, in upholding a state law which limited the width and load of trucks on state highways, wrote:

[173]

> The commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498, 30 L. Ed. 1189; Caldwell v. North Carolina, 187 U. S. 622, 626, 47 L. Ed. 336. It was to end these practices that the commerce clause was adopted.

In *Guy v. Baltimore*, 100 *U. S.* 434, 25 L. Ed. 743 (1879), a Maryland statute authorized Baltimore to collect wharfage fees from all vessels which docked in city wharves, provided that the material to be loaded or unloaded was not produced in Maryland. The city adopted an ordinance accordingly. The court commented:

> In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States. [at 443]

The court invalidated the ordinance on the ground that:

> * * * no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States more onerous public burdens or taxes than it imposes upon the like products of its own territory. [at 439]

The court also indicated that the wharves were property held for public use by the municipality, which could not "be permitted by discrimination" to impede commercial intercourse. That property held for public use may not be limited on a discriminatory basis has peculiar pertinence here. The New Jersey Legislature has deemed it appropriate to classify op-

[174]

erations of garbage landfill sites as public utilities. *N. J. S. A.* 48:2-13. As such they would appear to be affected with a public interest as much as a municipally owned wharf. It might be noted that the State has expressly pro-

hibited a public utility from directly or indirectly making or giving "any undue or unreasonable preference or advantage to any person, locality or particular description of traffic, or subject any particular person, locality or particular description of traffic to any prejudice or disadvantage." *N. J. S. A.* 48:3-4.

DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious. Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.

Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse. In *Pennsylvania v. West Virginia*, 262 *U. S.* 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923), a West Virginia statute restricted the exportation of natural gas to ensure a sufficient supply for its own citizens. Although the Supreme Court recognized (at 598, 43 S. Ct. at 665) that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of people of the state," the statute had to fall because it interfered with interstate commerce.

Oklahoma enacted a law which prevented a pipeline company from transporting natural gas outside the state. The purpose of the law was to conserve natural gas in the Oklahoma fields for consumption in the state. In declaring the statute violative of the Commerce Clause, the U. S. Supreme

[175]

Court, in *West v. Kansas Natural Gas Co.*, 221 *U. S.* 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), commented:

> * * * The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare,—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. [at 255, 31 S. Ct. at 571]

The Commissioner of Environmental Protection and the Hackensack Meadowlands Development Commission adopted the regulations in question to expand the life of the landfill sites for garbage collection in the Hackensack Meadowlands District from 3 to 3½ years. To attempt to accomplish that end by discriminating against sources of refuse solely because they originate or are collected outside the State under the circumstances here contravenes Article I, Section 8, Clause 3 of the U. S. Constitution. The regulations are invalid.

[68 *N. J.* 451, 348 A. 2d 505 (1975)]

[451]

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and State of New Jersey Department of Environmental Protection, Plaintiffs-Appellants,

v.

MUNICIPAL SANITARY LANDFILL AUTHORITY et al., Defendants-Respondents,

and

City of Yonkers, New York
Defendant-Intervenor-Respondent
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al., Plaintiffs-Intervenors-Respondents,

v.

STATE of New Jersey et al., Defendants-Appellants.

Supreme Court of New Jersey.
Argued Dec. 2, 1974.
Decided Nov. 18, 1975.

• • •

[455]

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for defendants-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

Mr. Herbert F. Moore argued the cause for plaintiffs-respondents, City of Philadelphia, etc., et al (*Messrs. Jamieson, Walsh, McCardell, Moore and Peskin*, attorneys; *Mr. Moore*, of counsel; *Mr. Arthur Meisel*, on the brief).

Mr. Vincent J. Dotoli argued the cause for plaintiffs-intervenors-respondents, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co., et al.

Mr. David Samson argued the cause for defendants-respondents, Municipal Sanitary Landfill Authority, etc. (*Messrs. Leib, Wolff and Samson*, attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for plaintiffs-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

MOUNTAIN, J.

These proceedings involve the joint review of two separate cases. In one case the judgment was entered pursuant to an opinion rendered in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). In the other, judgment was entered following the rendition of an oral opinion in a suit brought by the City of Philadelphia, together with the owners of several landfill operations in South Jersey, against the State of New Jersey and its Department of Environmental Protection (DEP). The [456] cumulative effect of these two judgments was to render unconstitutional certain sections of the Waste Control Act, N. J. S. A. 13:11-1 *et seq.*, together with regulations promulgated by DEP and by the Hackensack Meadowlands Development Commission (HMDC). The measures declared unconstitutional had as their pur-

pose the exclusion from this State of solid waste originating elsewhere. In each suit the trial court found that the laws and regulations under review violated the Commerce Clause, Article 1, § 8, clause 3, of the United States Constitution.

I

The comprehensive authority and responsibility delegated by the Legislature to the HMDC in the Hackensack Meadowlands Reclamation and Development Act, N. J. S. A. 13:17-1 *et seq.*, includes the power to provide facilities for the treatment and disposal of solid waste. N. J. S. A. 13:17-6(w), 13:17-10. The Waste Control Act, N. J. S. A. 13:1I-1 et seq., as originally enacted, contained a legislative finding "that the quality of New Jersey's environment be being threatened by the treatment and disposal of wastes generated or collected outside the State . . ." N. J. S. A. 13:1I-2. By amendments to this act that became effective early in 1974, the Legislature further found that the whole problem of solid waste disposal was growing increasingly acute and that it continued to be seriously exacerbated by the importation of waste from without the State; it determined to and did forbid that any further such waste be brought into the State.[1] The Waste Control Act also au-

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and dispersal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. [N. J. S. A. 13:1I-9]

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of

thorized and directed [457] the DEP to promulgate rules and regulations "prohibiting . . . the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State." N. J. S. A. 13:1I-4. Both HMDC and DEP promulgated regulations responsive to these legislative enactments, all looking to bar the importation of solid and liquid waste from outside the State.[2]

1. (Cont'd.)
the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act." P. L. 1973, c. 39. [N. J. S. A. 13:1I-10]

2. The pertinent portions of the HMDC regulations, which became effective September 1, 1973, reads as follows:

> (g) No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> (h) All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission [Hackensack Meadowlands Development Commission] . . . a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment. [N. J. A. C. 19:7-1.1]

The regulation of the DEP in its present form became effective February 1, 1974 and reads as follows:

> (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials

[458]

In order to enforce these statutes and rules HMDC and DEP filed a complaint seeking permanently to enjoin Municipal Sanitary Landfill Authority (hereinafter MSLA) [3] from accepting for disposal at its landfill sites any solid waste originating or collected outside of the State's territorial borders.[4] At the same time, with the consent of the defendants, an order to show cause issued with temporary restraints prohibiting MSLA from accepting for disposal out-of-state waste. On the return day of the order to show cause, defendants answered, challenging the constitutionality of both the DEP and HMDC regulations as well as the statutes authorizing their promulgation. Thereafter the City of Yonkers, New York, was granted leave to intervene as a party defendant, as it was

2. (Cont'd.)
and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State. [N. J. A. C. 7:1-4.2]

An earlier DEP regulation was before the trial court in the *Hackensack Meadowlands* case and is set forth in the court's opinion. 127 N. J. Super. at 164, 316 A. 2d 711. It was expressly repealed at the same time that it was superseded by the regulation last above quoted. N. J. A. C. 7:26-1.5.

3. Municipal Sanitary Landfill Authority is a joint venture wholly owned and operated by other named defendants. Its landfill operations are located in the Town of Kearny, within the Hackensack Meadowlands District.

4. Plaintiffs also sought statutory penalties pursuant to N. J. S. A. 13:11-5.

then using an MSLA site to dispose of its municipal refuse. No testimony was taken; the parties relied on affidavits and the transcript of previous [459] proceedings before the Hackensack Meadowlands Commission. In February, 1974, the trial judge filed a written opinion declaring the DEP and HMDC regulations to be in contravention of the Commerce Clause of the United States Constitution and therefore invalid. *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, supra,* 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). Judgment was temporarily stayed and on March 26, the Appellate Division granted plaintiffs' motion for a further stay pending determination of the appeal. Upon application by plaintiffs, this Court granted certification while the appeal was pending unheard in the Appellate Division, R. 2:12-2, 66 N. J. 337 (1974).

In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey, and further seeking temporary and permanent injunctive relief restraining DEP from enforcing the statutory provisions and from adopting or enforcing regulations intended to be in furtherance of the statutory purpose. On March 25, 1974 the trial judge (not the judge who had heard the *Hackensack Meadowlands* case), on cross-motions for summary judgment, rendered an oral opinion declaring that N. J. S. A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Following the filing of a notice of appeal to the Appellate Division, N. J. 102, 335 A. 2d 55 (1974), and the two actions were brought on for argument and disposition before us at the same time.

We thus face an issue of major public importance, namely, whether the regulations and statutes under review, designed to meet a pressing emergency in the life of the State, are of [460] such a nature as to violate the Commerce Clause, Article I, § 8, clause 3, of the United States Constitution.[5]

II

The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached "crisis proportions" due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean*, 64 N. J. 190, 193, 314 A. 2d 65 (1974). The facts presented in the two cases now before this Court, together with the legislative concern with this problem to which we have alluded above and of which more will be said below, serve to reinforce very strongly our consciousness of this extremely serious situation.

The materials constituting the records on these appeals reveal that since the effective date of the creation of HMDC, July 1, 1968, three surveys have been conducted to determine the volume and origin of the solid waste disposed of in the landfills located within HMD. The first survey, mandated by N. J. S. A. 13:17-10(a), found that in 1968 approximately 30,000 tons of solid waste entered HMD each week, of which about 4,000 tons originated outside of New Jersey. The second survey, con-

5. We do not reach the question of the validity of the regulations and statutes when measured against the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The argument for invalidity was found to be totally without merit in the HMDC case, 127 N. J. Super. at 168-69, 316 A. 2d 711, and has not been briefed before us by the parties in either of the two suits.

ducted in 1971, indicated that the total volume of solid waste disposed of in the District had risen to 42,000 tons per week, 5,000 tons of which originated outside of the State. The latest survey, conducted in 1973, revealed further increases to total weekly deposits of 55,000 tons of [461] solid waste, of which about 10,000 tons came from out of state.[6]

On the basis of the 1973 survey, it was estimated by HMDC that the existing landfill sites within HMD had a useful life of about three years, but that a ban on out-of-state refuse would extend their availability by approximately six months. Since the adoption of the ban on out-of-state dumping, the HMDC revised its estimates of the remaining life of the landfills within the HMD. It was calculated that as of January 1, 1974, sanitary landfills within that area had a total life expectancy of about 38 months if the ban were to be continued, but an availability of only 26 months if the ban were to be lifted. Furthermore, there is little chance of reducing the volume of garbage being dumped in the HMD which originates within the State, for the reason, among others, that the Commission has become obligated by statute, N. J. S. A. 13:17-10, to provide solid waste disposal facilities for over 100 New Jersey municipalities.

State-wide, the picture appears much the same. It was estimated that in 1971 over 40,000 tons of solid waste originating out of state was being buried each week in the 340 sanitary landfills then existing within the State. DEP estimated that in that year 1.5 million tons of solid waste originating outside of the State was buried in New Jersey. DEP has also recently computed the total life of the existing sanitary landfill facilities to be about three years in northern New Jersey and approximately ten years in the

6. It was determined that about 6,700 of the 10,000 tons were being disposed of in the three MSLA sites.

southern part of the State. It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%, with the increase in some specific landfills being as high as 50 to 100%.

Compounding the shortage problem are other extremely important environmental considerations. Many existing land- [462] fills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formely been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

To obtain a more comprehensive picture of the problem now facing this State, we have taken judicial notice of another report, released in 1972, which has further documented the crisis in this area.[7] According to this report, in 1972 almost 95% of New Jersey's solid waste was disposed of in landfills within the State. Further projections indicate that with the existing landfill acreage and the projected rate of dumping, all land that is presently committed to landfill operations will be exhausted by 1982. Also recognized is the strong probability that other environmental considerations may further limit the use for landfill purposes of much of the existing allocated acreage. Moreover, the HMD is singled out as an area where "[a] critical test of creative solid waste management is now taking place . . . ." The report estimated that by the end of 1975, the supply of acreage available for landfill in the

7. State of New Jersey County and Municipal Government Study Commission, Solid Waste: A Coordinated Approach (1972).

Meadowlands would be exhausted, an estimate very similar to those made by the HMDC and noted earlier in this opinion.

We are also aware that very little has yet been done in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem. The scope of federal legislation is thus far quite limited. The Solid Waste Disposal Act, 42 U. S. C. A. § 3251 *et seq.*, originally provided only for "financial and technical [463] assistance and leadership . . ." to develop new methods to reduce the volume of waste and to provide for economical methods of disposal, 42 U. S. C. A. § 3251(a)(6). The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act to provide financial assistance for the construction of solid waste disposal facilities and to furnish technical and financial assistance to promote and develop new methods of resource recovery. See *e.g.*, 42 U. S. C. A. §§ 3251(b)(1), 3254b. Although the Act as it now reads also provides for the encouragement of interstate cooperation to resolve the waste disposal problem, 42 U. S. C. A. §§ 3254, 3254a, nothing has been brought to our attention to indicate that New Jersey has entered into any agreement with her neighboring states of New York and Pennsylvania looking to this end.[8]

At the State level there has been more significant activity. In 1970 the Bureau of Solid Waste Management

8. In 1970, the Tri-State Transportation Commission [Connecticut, New York, and New Jersey] published a report entitled *Managing the Natural Environment—A Regional Plan for Water, Sewage, Air and Refuse*. The Commission, interestingly, foresaw the problem with which we are now faced, in its recognition that an interstate solution to the solid waste problem might be difficult to achieve because of increasing resistance to waste "imports." The Commission, therefore, recommended the continued use of landfill sites wherever possible along with regional development of large, efficient incinerators for the cities and inner suburbs. *Id.* at 32. To date, however, the Commission has been ineffective in bringing about the implementation of any of these suggestions.

of DEP published the *New Jersey State Solid Waste Management Plan,* which, among other proposals, recommended the creation of "Solid Waste Management Districts."[9] The *Solid Waste Management Plan* has been approved by the Federal Environmental Protection Agency as the official State plan for New Jersey.

Before the release of the *New Jersey Plan* in 1970, the Legislature had enacted the "Incinerator Authorities Law," [464] N. J. S. A. 40:66A-1 *et seq.*, delegating to municipalities the authority to provide solid waste collection and disposal facilities on a local basis. Prior thereto, in 1968, the "Solid Waste Management Authorities Law" had been enacted, N. J. S. A. 40:66A-32 *et seq.*, permitting the governing bodies of one or more municipalities to create solid waste management authorities to construct and operate incinerators and other solid waste treatment facilities. 1970, the year DEP released its *New Jersey Plan,* saw three further related enactments by the Legislature. The "Solid Waste Utility Control Act," N. J. S. A. 48:13A-1 *et seq.*, recognizing the need for state-wide control over the solid waste industry, provided that the Board of Public Utility Commissioners assume the duties of "regulating [the] economic aspects of solid waste collection, disposal and utilization service . . . ." N. J. S. A. 48:13A-2. The "County Solid Waste Disposal Financing Law," N. J. S. A. 40:66A-31.1, *et seq.*, took note of the fact that the cost of constructing disposal facilities would be prohibitive for many municipalities, and delegated to counties the authority to purchase or construct such facilities within the county "either alone or jointly with any municipality." N. J. S. A. 40:66A-31.4(1). Finally, the "Solid Waste Management Act," N. J. S. A. 13:1E-1 et seq., provided DEP with the

9. The Plan recommended either a "maximum sanitary landfill strategy" or a "maximum incineration strategy," depending on the availability of sanitary landfill acreage.

authority to "supervise solid waste collection and disposal facilities or operations," and to plan all future facilities having in mind that they should conform to "reasonably contemplated development of comprehensive community or regional solid waste collection and disposal facilities and operations and to any State-wide, regional, county and intercounty plans for solid waste management," N. J. S. A. 13:1E-4. These statutes are in addition to the Hackensack Meadowlands Reclamation and Development Act and the Waste Control Act that are earlier discussed above.

Supplementing these statutory provisions, the HMDC has recently announced blueprints to phase out all dumping [465] in the Meadowlands by 1979. It is currently planning to construct a baling plant to compact waste into solid, nonflammable building blocks that may then be used as the base of a 2,000 acre meadowlands park located upon existing landfill sites. Also projected is a resource-recovery plant.

Assuming that plans such as these formulated by the HMDC are implemented within the proposed time period, it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Increasing the lifespan of the HMDC landfills would also alleviate future pressure on other landfills located throughout the State, to accept waste now handled by HMDC, thereby preventing any acceleration of their depletion and preserving lands in other areas of the State from becoming disposal areas.[10]

10. There is every indication that this was the true reason for the enactment of the amendments to the Waste Control Act. (L. 1973, c. 363). Following the promulgation of the regulations banning out-of-state dumping in HMDC, the out-of-state wastes were

III

It is in the light of these facts and with a full realization of the magnitude of the problem, that we address ourselves to the issue as to whether or not the statutes and regulations under attack must fall because they are found to constitute an impermissible burden upon interstate commerce. In both cases now before us the State preliminarily contends that the question of the significance of the burden should not be reached, as the movement of garbage [466] and refuse, things not of commercial value and harmful to the health and welfare of the citizens of the State, does not in fact constitute interstate commerce within the meaning of the constitutional phrase. Therefore, it is argued, any statutes or regulations prohibiting the importation of these deleterious and valueless substances would not violate the Commerce Clause. The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, through the promulgation of regulations by DEP, has in effects been amended to exclude only that refuse which has no value either for fuel or recycling purposes.

The theory that objects harmful to the general public fall beyond the purview of the Commerce Clause has long been recognized by the United States Supreme Court. Perhaps the best articulation of this doctrine appears in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 S. Ct. 689, 31 L. Ed. 700 (1888):

> • • • Doubtless the States have power to provide by law suitable measures to prevent the introduction into

10. (Cont'd.)
then carried to smaller landfill sites in New Jersey which had been originally designed to serve only neighboring municipalities. Thus, in order to prevent the total depletion of these landfills, a statewide ban on solid waste imports was enacted.

> the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. [125 U. S. at 489, 8 S. Ct. at 700, 31 L. Ed. at 708]

Accord, Baldwin v. Seelig, 294 U. S. 511, 525, 55 S. Ct. 497, 79 L. Ed. 1032, 1039 (1935); *Sligh v. Kirkwood*, 237 U. S. 52, 59-60, 35 S. Ct. 501 L. Ed. 835, 838 (1915). *See Crossman v. Lurman*, 192 U. S. 189, 196-97, 24 S. Ct. 234, 48 L. Ed. 401, 404 (1904); *Plumley v. Massachusetts*, 155 U. S. 461, 468, 472, 15 S. Ct. 154, 39 L. Ed. 223, 225, [467] 227 (1894). Also pertinent to the proposition that garbage or refuse is not an article of interstate commerce is the decision in *Clason v. Indiana*, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). That case involved the validity of an Indiana statute which required that within 24 hours after the death of certain large animals, the owners should burn or bury the carcasses or deliver them to a disposal plant licensed to do business within the state. Transportation for disposal to points outside the state was prohibited. 306 U. S. at 441, 59 S. Ct. 609, 83 L. Ed. at 860. The Supreme Court, after recognizing that the pur-

pose of the statute was not discriminatory, but rather to promote the health of the people, concluded that no impermissible burden on interstate commerce had been shown to exist or as likely to occur. *Id.* at 444, 59 S. Ct. 609, 83 L. Ed. at 862.

The teaching of these cases seems to be that commodities or substances injurious to the public health are not "articles of commerce" within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.

Nevertheless, refuse or solid waste may have intrinsic value of its own. As the trial judge noted in *Hackensack Meadowlands,* ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity." 127 N. J. Super. at 170, 316 A. 2d at 716. Based on this factor, that court concluded that "the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce." *Id.* We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce [468] is involved, as these regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.

The amendments to the Waste Control Act, N. J. S. A. 13:II-9 and 13:II-10,[11] totally banning the disposal of solid

11. Quoted above in footnote 1.

waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless, as we have pointed out, the DEP regulations, issued in response to this legislation, do except from the ban on out-of-state refuse those types of solid waste which may have a value for recycling or for use as fuel.[12] In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of "merchantable" items or legitimate "articles of trade," as those wastes which can be put to effective use are explicitly excepted from the ban. Any assertion that the Commerce Clause applies here must therefore rest on the proposition that the mere transportation and disposal of valueless waste between states constitutes interstate commerce within the meaning of the constitutional provision.

A short time ago, in *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E. D. Pa. 1965), *aff'd,* 357 F. 2d 806 (3d Cir.), *cert. denied,* 384 U. S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966), the transportation and disposal of refuse was itself specifically found to constitute interstate commerce. That case was a Sherman antitrust action brought against an association of refuse removers in the greater Philadelphia area who collected in Pennsylvania but often dumped in New Jersey. 242 F. [469] Supp. at 796. The District Court found that the government had clearly met its burden of showing that defendants' business was commerce, and was interstate in nature. *Id.* at 796-97. The court emphasized that the real

12. DEP was enjoined by the decision below from enforcing these regulations as well as the relevant sections of the Waste Control Act. These regulations are quoted in footnote 2 above.

subject of "trade or commerce" was not the worthless garbage that was being transported but rather the valuable service of its removal and disposal. *Id.* at 799.

The *Pennsylvania Refuse* case affords an illustration of the part played by the Commerce Clause as justification for bringing a particular business scheme within the reach of a Congressional regulatory enactment. The Sherman Act purports only to prohibit as illegal *certain* combinations in restraint of trade or commerce, namely, those where the trade or commerce is interstate in nature. This is the *affirmative* aspect of the Commerce Clause—to support some exertion of federal control or regulation. Similarly, persons engaged in a disposal business, interstate in nature, have been found to come within the scope of the federal Fair Labor Standards Act. *Schultz v. Instant Handling, Inc.*, 418 F. 2d 1019 (5th Cir. 1969); *Barnett v. A-1 Scavenger Service Co.*, 466 S. W. 2d 150 (Mo. Ct. App. 1971). But we deal here, in the case before us, with what are customarily called the "negative implications" of the Commerce Clause, the extent to which it may be invoked—not to support an exercise of federal regulation—but rather to strike down or restrict state legislation. The Supreme Court has understandably adopted a very sweeping concept of the Commerce Clause in its affirmative application, in order to further the extent of Congressional control. A much more confined notion of the reach of this provision has, however, been manifested, as we shall see, when it has been invoked to prohibit or limit state action.

IV

Assuming for present purposes that the service of transporting and disposing of solid waste in the factual con- [470] text here presented is in fact interstate commerce in the constitutional sense, we next consider the contention that the relevant sections of the Waste Control

Act amount to an improper effort to regulate such commerce snice such control lies within the exclusive cognizance of the federal government. In considering this preemption argument in relation to the cases before us, we note initially that in the *Hackensack Meadowlands* case the trial court determined that in this area of solid waste disposal no such preemption is to be found. 127 N. J. Super. at 171, 316 A. 2d 711.

The need to determine whether, in a particular segment of interstate commerce, a state is precluded from acting because of federal preemption is the direct result of the landmark decision of the United States Supreme Court in *Cooley v. Board of Wardens*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851). There the Court for the first time clearly recognized that states have concurrent authority with the federal government to deal with those subjects of interstate commerce which do not necessarily require a national or uniform system of regulation. In a more recent statement appearing in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), Justice Brennan laid down the rule that a state would be precluded from acting only where either the "nature of the subject matter" or an "explicit declaration of congressional design" indicated that state efforts were to be precluded. *See* 373 U. S. at 143-152, 83 S. Ct. 1210, 10 L. Ed. 2d at 257-62.

The problem which arises in most instances where Congress has acted—as is here the case—results from there having been a failure on the part of Congress to make clear whether there was or was not a desire and intent on its part to exercise exclusive control in a particular area. The Supreme Court has recognized that "in the final analysis, there can be no one crystal clear distinctly marked formula," *Hines v. Davidowitz*, 312 U. S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941), resort to which will in

all cases unequivocally reveal Congressional intent. *Benson, The Supreme* [471] *Court and the Commerce Clause,* 1937-1970 at 277-78 (1970).

Fortunately, although Congress has acted in this field through the passage of the Solid Waste Disposal Act of 1965 and its subsequent amendments, it has clearly indicated its intention not to preempt the area. As we have noted earlier, federal legislation has thus far been largely limited to providing "financial and technical assistance and leadership" to develop new methods of disposal and resource recovery and to reduce waste. In the Congressional findings is a pronouncement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U. S. C. A. § 3251(a)(6). We also note that severe budgetary cuts in recent years have reduced federal action even below that originally envisioned in the Solid Waste Disposal Act. For example, the Nixon Administration cut the federal solid waste budget from $30 million in 1973 to a projected $5.8 million for the fiscal year 1974, and sought to restrict the federal role to the control and disposal of hazardous wastes. No further funds were provided for such items as research and development, and technical assistance was substantially curtailed. See Environmental Law Institute, *Federal Environmental Law* 1307-1310 (1974).

It is entirely clear that the case for federal preemption must fail. Congress has encouraged state action; it has not precluded it.

V

In considering whether the statutes and regulations here under scrutiny do or do not constitute an impermissible regulation of interstate commerce, we bear in mind that the Constitution "was framed upon the theory

that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. Seelig, supra,* 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935). Primarily the purpose sought to be served by including the Commerce Clause in the Constitution was to check or eliminate the *economic* discrimination among the states that had been so rampant under the Articles of Confederation. *E.g., Baldwin v. Seelig, supra,* 294 U. S. at 521-23, 55 [472] S. Ct. 497, 79 L. Ed. at 1037-38; *H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 533-35, 69 S. Ct. 657, 93 L. Ed. 865, 871-72 (1949); *Ribble, State and National Power Over Commerce* 3-4 (1937).

Despite this broad grant of power given Congress by the Commerce Clause, innumerable problems have continuously arisen. This is in large part because the states, in the exercise of their police power to protect the health, welfare and safety of their citizens, have passed many laws which often in effect do directly regulate interstate commerce. Thus over the years the United States Supreme Court has been called upon to arbitrate between these competing demands of state and federal power.

The cases before us present such a situation. We have no difficulty in finding, as did the courts below, that extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State. Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw v. Byram Township,* 86 N. J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N. J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> • • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission,* 120 N. J. Super. 118, 122, 293 A. 2d 426, 428 (App. Div. 1972); emphasis in original]

[473]

We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, *Adams v. Shannon,* 7 Cal. App. 2d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, *Ecology and the Police Power,* 16 S. D. L. Rev. 26 (1971).

Thus the underlying issue is whether or not this exercise of residual state power, obviously exerted for legitimate and important purposes, must fail because of the

demands of the Commerce Clause. We do not deem it necessary or useful to retrace in any particular detail the history of the negative implications of the Commerce Clause or the manner in which this body of doctrine has evolved through successive decisions of the Supreme Court. Dicta in *Gibbons v. Ogden,* 22 U. S. (9 Wheat.) 1, 209, 6 L. Ed. 23 (1824) suggested that the intent of this grant of power to Congress had been to exclude entirely concomitant action on the part of the states. At least, however, since *Cooley v. Board of Wardens, supra,* 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851), it has been clear that state legislation will not necessarily be deemed unconstitutional simply because it can be shown that it may have some impact upon commerce that is interstate in nature. Over the years the Supreme Court has applied various tests and has adopted differing approaches in its treatment of the problem as to whether particular state legislation [474] does or does not fall within the interdict of this provision.

In 1938, in the case of *South Carolina State Highway Department v. Barnwell Bros.,* 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, the Court considered a South Carolina statute that had established size and weight limits for trucks using state highways. The result of enforcing the statute was to exclude many vehicles coming from other states that were engaged in interstate commerce. The Court found that the statute did not violate the Commerce Clause. In commenting upon this case, Professor Engdahl recently observed,

> [T]he court now [in *Barnwell*] formulated better than had been articulated before the test of the negative implications of the commerce clause. In Stone's words, the court is to inquire "whether the state legislature in adopting regulations such as the present has

> acted within its province, and whether the means or regulation chosen are reasonably adopted to the end sought." 303 U. S. at 190 [58 S. Ct. 510]. [*Engdahl, Constitutional Power: Federal and State* (1974) § 11.03, p. 272]

In addressing the first of these criteria—whether the state legislature has acted within its province—at least two subordinate issues demand attention: can it be said that the subject matter of the legislation has been preempted by Congress, and is the enactment a valid and proper exercise of the state's police power. It was probably implicit in *Barnwell*, as it has been explicit in both earlier and later decisions, that state legislation must also meet a third test —whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. Recent commentators have questioned whether this third "weighing" test should be, or will continue to be, applied. *Engdahl, op. cit. supra*, § 11.08, pp. 290-94; *Note*, 45 *Univ. of Col. Law Rev.* 487, 489 (1974). In any event it seems clear that it has not yet been entirely abandoned. *Pike v. Bruce Church*, 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, 178 (1970). *But see Brotherhood of Loco-* [475] *motive Firemen & Enginemen v. Chicago, Rock Island & Pacific R. R.*, 393 U. S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

In the case before us it is evident that the New Jersey Legislature—and the agencies that adopted implementing regulations—were looking to the accomplishment of a wholly legitimate end well within their competence. In seeking to prolong the useful lifespan of landfill areas within the state they were ministering to the needs of public health as well as endeavoring to preserve the environment. As we have indicated, there has very clearly been no federal preemption and the legislation is certainly

an appropriate exercise of the state's police power. *Cf. Oxford Consumer Discount Co. of North Philadelphia v. Stefanelli*, 102 N. J. Super. 549, 567-574, 246 A. 2d 460 (App. Div. 1968), modified, 104 N. J. Super. 512, 250 A. 2d 593 (App. Div. 1969), further modified, 55 N. J. 489, 262 A. 2d 874 (1970). Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. Less than total exclusion of solid waste generated outside New Jersey would have been of no avail. Even the means that have been adopted—apparently the best available—offer no certainty of providing more than much needed time within which to devise by technological effort and ingenuity a satisfactory ultimate solution. Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state.

The further step in the testing process would require us to assay the burden on interstate commerce and to weigh it against [476] the benefit to the state. The burden is slight indeed. There is nothing to indicate that adequate alternatives are not available in both New York and Pennsylvania. The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks. When balanced against the dangers

to public health and to the environment that this legislation seeks to avert, these relatively small costs and modest inconveniences seem minor indeed.

Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Commission,* 15 Or. App. 618, 517 P. 2d 691 (1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago,* 509 F. 2d 69 (7th Cir. 1974), *cert. denied* 421 U. S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Improvement Commission,* 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), appeal dismissed, 414 U. S. 1035, 94 S. Ct. 532, 38 L. Ed. 2d 326 (1973) (prevention and control of marine oil spillage); *Construction Industry Association of Sonoma County v. City of Petaluma,* 522 F. 2d 897 (9th Cir. 1975) (ban on further building).[13]

We know that not every hindrance to interstate commerce that may result from a state law will be deemed sufficient to invalidate the legislation. We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have [477] become so endangered upon this "plundered planet," insistently demand every reasonable protection that can possibly be recruited.

In this area the state has not only a right to protect its own resources, but also the duty to do so, in the interest of its citizens, as well as others. We are not here concerned with the problem presented in such cases as *West v.*

13. A similar legislative ban on the importation of waste materials has been enacted in the State of Maine. See *Maine Rev. Stat. Ann. Title* 17, § 2253 (Supp. 1974-75).

Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) and *Pennsylvania v. West Virginia,* 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). There the Court was called upon to review state statutes restricting the flow of natural gas to citizens of the state in question. Quite understandably it was found that the enactments did violence to the Commerce Clause. In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic. We know that there resides in each of the several states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty. In *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907), the Supreme Court entertained an original action by the State of Georgia, in which the latter sought to restrain an out-of-state manufacturer from permitting deleterious fumes to be blown into the plaintiff state and do damage to trees, fields and crops. In determining that an injunction would issue, practically as of right, Justice Holmes said,

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. [478] It has the last word as to whether its

> mountains shall be stripped of their forests and its inhabitants shall breathe pure air. [206 U. S. at 237, 27 S. Ct. at 619, 51 L. Ed. at 1044]

It is true that there the Court dealt with a nuisance, which is not present here. Yet, the case has relevant import. The protection to its environment and natural resources that a state can demand of right from a federal court should be equally available to it by way of protective legislation. We do not mean to be understood as saying that every assertion of a state's quasi-sovereign right to protect its environment, ecological values and natural and human resources will be sustained regardless of the impact upon interestate commerce. Clearly this is not so. But where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action.

The judgments of the respective trial courts are hereby reversed; all stays or injunctive orders are vacated.

For affirmance in both cases: Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—6.

For reversal: None.

Supreme Court of the United States

No. 75-1150

City of Philadelphia et al., Appellants, v. State of New Jersey et al. — On Appeal from the Supreme Court of New Jersey.

[February 23, 1977]

PER CURIAM.

This suit challenges the constitutionality of a New Jersey statute prohibiting any person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the State," except garbage to be fed to swine. New Jersey Pub. L. 1973, c. 363. The New Jersey Supreme Court held that the act was not pre-empted by a federal statute addressing questions of waste disposal, the Solid Waste Disposal Act of 1965, 42 U. S. C. § 3251 *et seq.*, and was not unconstitutional as discriminatory against or placing an undue burden on interstate commerce. *City of Philadelphia et al. v. State of New Jersey et al.*, 68 N. J. 451 (1975). We noted probable jurisdiction on April 5, 1976, 425 U. S. 910 (1976).

On October 21, 1976, the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. §6901 *et seq.* became law. The parties at the Court's request supplemented their briefs to address the question of the impact of the new federal statute on the New Jersey Act. Appellants argue that the Act displaces the New Jersey law, and appellees argue that it does not pre-empt or in any way undercut the validity of the New Jersey legislation. While

federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute. The judgment of the New Jersey Supreme Court is therefore vacated and the case remanded for reconsideration in the light of the Resource Conservation and Recovery Act of 1976.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. § 6901 *et seq.* evidences a federal concern with the growing problem of waste disposal in this country. This complex statute attempts to deal with this problem in a variety of ways. Because the impact of the statute will depend in part on the regulations promulgated under it, generalizations at this time as to the effect of the statute should be made with caution. But I do think it is abundantly clear from the text of the statute and from its legislative history that Congress did not intend to pre-empt state laws such as the one at issue here. In its report on the statute the House Committee on Interstate and Foreign Commerce recognized the existence of state laws similar to this New Jersey law. H. R. Rep. No. 94-1491, 94th Cong., 2d Sess., 3, 10. The report explicitly disclaimed any pre-emptive intention.

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.*, at 33.

In view of this express disclaimer, I do not understand how the Court can assume that pre-emption remains an open question.

We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty.

SUPREME COURT OF NEW JERSEY
A-82 September Term 1974

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DE LORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants-Appellants.

Argued May 10, 1977. Decided June 20, 1977

On Remand from the Supreme Court of the United States.

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for appellants (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Skillman* of counsel and on the brief; *Mr. Peter Herzberg* and *Mr. Nathan M. Edelstein,* Deputy Attorneys General, on the brief).
Mr. Herbert F. Moore argued the cause for respondents (*Messrs. Jamieson, McCardell, Moore, Peskin and Spicer,* attorneys; *Mr. Moore* of counsel; *Mr. Meisel,* on the brief).

The opinion of the Court was delivered by
MOUNTAIN, J.

On November 18, 1975, this Court rendered its decision in *Hackensack Meadowlands v. Municipal Landfill Authority,* 68 *N. J.* 451. The opinion upheld the constitutionality of *L.* 1973, *c.* 39, as supplemented by *L.* 1973, *c.* 363, known as the Waste Control Act, *N. J. S. A.* 13-1I-1 *et seq.* The principal purpose of this statute is to prohibit the disposal within New Jersey of waste originating out of state.

Plaintiffs appealed to the Supreme Court of the United States, where probable jurisdiction was noted April 5, 1976, 425 *U. S.* 910, 47 *L. Ed.* 2d 760, *sub nom. City of Philadelphia v. State of New Jersey.* During the course of oral argument before the Supreme Court on November 3, 1976, it was brought to the attention of that Court that twelve days prior thereto the President had signed into law the Resource Conservation and Recovery Act of 1976, *Pub. L.* 94-580, 42 *U. S. C. A.* § 6901, *et seq.* This statute expands the federal role with respect to the disposal of solid wastes. In compliance with an order dated November 15, 1976, the parties filed supplemental briefs in the Supreme Court addressed to the issue as to the effect this act might have upon the constitutionality of the New Jersey legislation. On February 23, 1977 the Supreme Court, with four justices dissenting, issued a *per curiam* opinion vacating the judgment of this Court entered November 18, 1975 and remanding the case for reconsideration in light of the foregoing Congressional enactment. *City of Philadelphia v. State of New Jersey,* — U. S. —, 51 *L. Ed.* 2d 224. More specifically the opinion formulated the issue for determination on remand in these words,

> We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation

and Recovery Act of 1976 pre-empts the New Jersey statute.

[– *U. S.* at –, 51 *L. Ed.* 2d at 226]

We have carefully examined the Congressional enactment as well as the materials bearing upon its history, and have had the benefit of briefs and argument of counsel addressed to the issue so presented. In our opinion, for the reasons set forth below, we believe the Congressional enactment does not effect federal pre-emption either as to the disposal of hazardous waste or with respect to any other area of solid waste disposal. In order that the basis for our conclusion may be fully comprehended we proceed to examine the two major subchapters of the federal act. Even though hazardous waste disposal is not clearly at issue in this case, we deem it appropriate to consider initially the subchapter of the Act which addresses that problem.

I

Subchapter III of the Act (42 *U. S. C. A.* §§ 6921-6931) is entitled, "Hazardous Waste Management." In this portion of the statute there is set forth a comprehensive program for the disposal of hazardous waste. The latter is defined as,

> . . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. [42 *U. S. C. A.* § 6903(5)] [1]

It seems clear that it would include nuclear waste.

The Administrator of the Environmental Protection Agency is directed to ". . . develop and promulgate criteria for identifying the characteristics of hazardous waste . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 *U. S. C. A.* § 6921(a). Based upon such study, particular hazardous wastes are to be identified, the list to be revised from time to time as may be appropriate. *Id.*

The sections of the statute immediately following very carefully set forth detailed standards to be applied to (1) generators of hazardous waste (42 *U. S. C. A.* § 6922); (2) transporters of hazardous waste (42 *U. S. C. A.* § 6923); and (3) owners and operators of hazardous waste treatment, storage, and disposal facilities (42 *U. S. C. A.* § 6924). This hazardous waste program is not an exclusively federal venture. Individual states are authorized to develop their own hazardous waste control and disposal programs subject to the approval of the Administrator. 42 *U. S. C. A.* § 6926(b). Significantly, under a section entitled "Retention of State Authority," the states are prevented from imposing hazardous waste requirements less stringent than those authorized by the federal guidelines (42 *U. S. C. A.* § 6929). If a state-enacted program deviates from the federal mandates the Administrator has the power to withdraw federal approval (42 *U. S. C. A.* § 6926(e)).

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1. *N. J. S. A.* 13:1I-3(c) contains a definition of "solid waste" expansive enough to exclude from disposal in New Jersey "hazardous waste" as that term is defined in the federal act.

This Subchapter may fairly be characterized as an effort to achieve a degree of uniformity in hazardous waste control. The federal guidelines pertaining to parties involved in the generation, transportation and disposal of such waste establish a minimum national standard below which a state hazardous waste program may not operate. However, the Act does not prevent the State from imposing more stringent standards to hazardous waste operations within its borders. New Jersey has done just this through the enactment of *N. J. S. A.* 13:1I-1 *et seq.*

We view this ban on disposal of waste originating out-of-state as entirely consistent with the federal program. That the federal hazardous waste guidelines and the New Jersey prohibition of out-of-state waste can function smoothly together is illustrated by using a hypothetical New Jersey hazardous waste disposal plant as an example. Once the federal regulations establishing performance standards are promulgated,[2] this plant will be required to comply with announced guidelines pertaining to record-keeping, reporting systems, plant design and training of personnel (42 *U. S. C. A.* § 6924(1)-(7)). The sole state restriction imposed upon the operation of the plant will be the ban on the receipt of hazardous waste which originated outside of New Jersey. *N. J. S. A.* 13:1I-10. It is readily apparent that both the federal and state regulations operate without conflict. The New Jersey plant will be in strict compliance with all federal requisites even though out-of-state wastes are prohibited.

The critical inquiry relevant to federal pre-emption is "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of

2. It should be noted that as of this date no federal regulations have been promulgated. It is clearly established that potential federal regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Welch Co. v. New Hampshire*, 306 U. S. 79, 84-85, 83 L. Ed. 500, 504-505 (1939).

the field. . . ." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 *U. S.* 132, 142, 10 *L. Ed.* 2d 248, 256-57 (1963). Having concluded that "federal superintendence" of the field of hazardous waste is indeed unimpaired we perceive no federal pre-emption resulting from Subchapter III.

II

Subchapter IV of the Congressional enactment (42 *U. S. C. A.* §§ 6941--6949) is entitled "State or Regional Solid Waste Plans." This portion of the Act deals with the treatment and disposal of *non-hazardous* solid wastes, materials that are or may become "environmentally sound," 42 *U. S. C. A.* § 6941, and that may either be reclaimed or disposed of with a minimum of danger to human life and health. It is with wastes of this sort that we are here directly concerned.

As to the disposal of solid waste of a non-hazardous nature, it also seems clear that there has been no federal pre-emption by virtue of this statute. On the contrary, as will be seen, the Act affirmatively encourages state action and expressly eschews any intent on the part of Congress to do more than offer guidance together with technological and fiscal support.

It is well-settled today that pre-emption deriving from federal legislation must take the form of "an unambiguous Congressional mandate." *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, 373 *U. S.* at 147, 10 *L. Ed.* 2d at 259 (1963). Where no such mandate is discernible, there will be no pre-emption. The Supreme Court appears to have been especially reluctant to find an intent to pre-empt where state legislation has been enacted to serve local environmental interests, *Askew v. American Waterways Operators*, 411 U. S. 325, 36 *L. Ed.* 2d 280 (1973), or to protect public health. *Huron Portland Cement Co. v.*

Detroit, 362 *U. S.* 440, 4 *L. Ed.* 2d 852 (1960). Our state statute, as was made clear in this Court's earlier opinion, 68 *N. J.* at 472-73, is an exercise of the police power of this State enacted in the interest of protecting the environment of New Jersey and the welfare of its citizens, *i.e.*, the public health.

The intent of Congress to leave this power with the several states, insofar as the disposal of non-hazardous waste is concerned, is clearly manifest. The report on these statutory provisions of the House Committee on Interstate and Foreign Commerce, *H. R. Rep.* No. 94-1491, 94th *Cong.* 2d Sess. is explicit.

> The Federal guidelines published pursuant to Title IV are not mandatory upon the states . . . .
>
> [*Id.* at 5]

> It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.
>
> [*Id.* at 33]

> [T]he provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*Id.*]

Senator Randolph, a co-sponsor of the bill, had this to say,

> In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.

> This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.
>
> Guidelines should provide the States and area planning agencies with maximum flexibility, while assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.
>
> To assure that the federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request.
>
> [122 *Cong. Rec.* 11069 (1976)]

The statute itself (Subchapter IV) is a blueprint for state action to be accompanied by federal guidance and assistance. First there are set forth the objectives of Subchapter IV:

> The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. [42 *U. S. C. A.* § 6941]

The Congressional plan for the attainment of these objectives follows. The federal Administrator of the Environmental Protection Agency is directed to "publish guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services." 42 *U. S. C. A.* § 6942(a). At a later date, probably some time in 1978, the Administrator is to issue further guidelines, these "to assist in the development and implementation of State solid waste management plans." 42 *U. S. C. A.* § 6942(b).

The State plan is seen as the operational vehicle by and through which the statutory objectives are to be accomplished. Minimum requirements for federal approval of any such plan are set forth. 42 *U. S. C. A.* 6943. Disposal must be by sanitary landfill; open dumps are no longer to be permitted. 42 *U. S. C. A.* §§ 6944-45. Within an allotted span of time the Governor of each state, acting in concert with elected local official and aided by the guidelines promulgated at the federal level, is to identify regions within the state as being appropriate areas within which to carry out programs of solid waste management and disposal. 42 *U. S. C. A.* 6946. Provision is made

for interstate regions where this is suggested by the federal guidelines and approved by representatives of the respective states. *Id.* Upon approval of a State plan by the Administrator of the Environmental Protection Agency, the State becomes entitled to apply for and receive federal financial assistance. 42 *U. S. C. A.* 6947.

The position of the plaintiffs before this Court on remand from the Supreme Court is stated in their brief as follows:

> Plaintiffs do not urge that *P. L.* 1973, *c.* 363 has been preempted under the Commerce Clause. They do, however, submit that said statute must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 *U. S.* 52, 67 (1940).
>
> [*Plaintiffs' Brief*, p. 4]

They argue further that if a region lying partially within each of two or more states is identified by the federal Administrator of Environmental Protection as an appropriate unit for planning regional solid waste management services under 42 *U. S. C. A.* § 6942(a), then the respective Governors of the states in question are ***required*** by the federal statute to agree upon and fix the precise boundaries of the region and to develop a plan of solid waste disposal for the area so laid out. The argument concludes by asserting that the Governors and other involved state officials have no discretion in the matter, that Congress has mandated that the action be taken.

We have no hesitancy in rejecting this contention. The statute (Subchapter IV) cannot be so read. We need not address the underlying difficulties that such a construction would pose, since we are satisfied that as a matter of

statutory construction, Congress intended to leave to each state the decision as to whether it will or will not accept recommendations set forth in federal guidelines and adopt, or not adopt, a State plan qualifying for federal approval. The only sanction deriving from the statute, in the event of non-compliance, is an ineligibility to receive federal funds and perhaps technological aid. As the House Report explains,

> If those [statutory] objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*House Report, supra,* at 33]

> The Federal guidelines published pursuant to Title IV are not mandatory upon the states.
>
> [*Id.* at 5]

Furthermore *L.* 1973, *c.* 363, forbidding the disposal within New Jersey of solid and liquid wastes originating elsewhere, is not presently in conflict with any federal proposal or guideline, since none has been made or promulgated. When federal guidelines as to proposed regions are in fact published, they may not even suggest or recommend that any part of New Jersey be joined with the City of Philadelphia in a common region. On the other hand, if such a suggestion or recommendation were to be made the Governor of Pennsylvania or the Governor of New Jersey may fail to approve it. Finally, should such a proposal be made and approved by both states, this statute need not frustrate fulfillment of the proposal. The New Jersey Commissioner of Environmental Protection could simply exercise his statutory authority to decide that under

such circumstances the introduction of out-of-state waste could be ". . . permitted without endangering the public health, safety and welfare. . . ." *N. J. S. A.* 13:1I-10.

In brief recapitulation, it is our conclusion that the Resource Conservation and Recovery Act of 1976 does not pre-empt the control and management of hazardous solid waste disposal. Parenthetically, we note again that this case is not directly concerned with the disposal of hazardous waste, nor do plaintiffs contend otherwise. It is our further conclusion that in no other field or area of waste disposal does the act effect any federal pre-emption. In fact it gives strong encouragement to the several states to take positive action on their own, supported by federal assistance and direction in the form of funds, technological aid and guidelines. We reject plaintiffs' argument based upon the Supremacy Clause, since we interpret Subchapter IV of the statute as offering incentives for desired action, but mandating nothing. The New Jersey statute is in conflict with no federal regulation or proposal, since none exists. Should federal guidelines be promulgated the statute presents no barrier against compliance nor to achieving effective interstate or regional cooperation.

After the remand from the Supreme Court of the United States, the Attorney-General filed a motion with this Court seeking, inter alia, the authority immediately to enforce *L.* 1973, *c.* 363. Originally, by order of December 11, 1975, we vacated a previous stay of judgment and authorized the immediate implementation of the statute in accordance with our decision of November 18, 1975. By order dated April 4, 1977, we reserved decision on the pending motion for a stay and directed that counsel address themselves to the issue so presented at the same time the meritorious issue posed on remand was argued. This was done. Plaintiffs resist the Attorney-General's application, urging that the *status quo* be maintained pending

their prospective application for further relief to the Supreme Court of the United States. The reasons which motivated us to deny plaintiffs' application for a stay of judgment following the rendition of our decision in November, 1975, are as compelling today as they were then. Additionally, we note that meanwhile a period of 18 months has elapsed.

The motion of the Attorney-General is granted to permit the prompt enforcement of *L.* 1973, *c.* 363 in accordance with our earlier decision, to take effect, however, only after the expiration of 30 days from the date of this opinion which we consider a reasonable period of time to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment, should they determine to do so.

In conclusion, we reaffirm the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above.

Chapter 363 Laws of N. J. 1973
Approved January 2, 1974.

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 12, 1973

By Senators WALLWORK, HAGEDORN and HIRKALA

(Without Reference)

AN ACT to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

2. No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, °*except garbage to be fed to swine in the State of New Jersey,*° until the commissioner

shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

3. This act shall take effect on the first day of the first month following its enactment.

ADMINISTRATIVE ORDER NUMBER FORTY.

(Adoption of Emergency Rule.)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
RICHARD J. SULLIVAN, COMMISSIONER
TRENTON

WHEREAS, Governor T. Cahill, on January 2, 1974, did sign into law Chapter 363 of the Public Laws of 1973, an Act prohibiting the importation into New Jersey of solid and liquid wastes generated outside the the State, effective February 1, 1974; and

WHEREAS, that Act permits the Commissioner of the Department of Environmental Protection to promulgate regulations permitting and regulating the treatment and disposal of out of state wastes upon determining that such action can be permitted without endangering the public health, safety and welfare; and

WHEREAS, the President of the United States and Governor William T. Cahill have recognized and declared that a critical shortage of fuel exists throughout New Jersey and the Nation; and

WHEREAS, there is substantial evidence that the manufacture of reusable materials from recycled solid waste consumes less energy than the manufacture of those same materials from virgin materials; and

WHEREAS, viable processes exist for the production of useful and necessary energy and energy producing fuels from municipal solid waste; and

WHEREAS, the recycling and recovery of secondary materials from solid waste conserve and protect many valuable and diminishing natural resources; and

WHEREAS, New Jersey is one of the nation's leading producers of chemicals and petrochemicals and, therefore, produces substantial quantities of diverse hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes; and

WHEREAS, in order to preserve and protect the quality of New Jersey's environment, the Department of Environmental Protection has proposed rules which would prohibit the disposal of such hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes at conventional sanitary landfills within the State; and

WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

WHEREAS, it is apparent that the economic survival of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; and

WHEREAS, the imminent ban upon the importation into this State of wastes intended for resource recovery and recycling facilities, and of those hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities presents both an immediate and long-term peril to public health, safety and welfare.

NOW THEREFORE, under the powers and duties conferred upon me by the New Jersey Administrative Procedure Act, N. J. S. A. 52:14B-4(c) and N. J. A. C. 15:15-4.18 et seq. which empowers the Commissioner of the Department of Environmental Protection to adopt, amend

or repeal an administrative rule whenever the Commissioner determines that an imminent peril to public health, safety and welfare exists, I do hereby adopt the following rules:

N. J. A. C. 7:14 IMPORTATION OF SOLID AND LIQUID WASTE FROM OUTSIDE NEW JERSEY.

N. J. A. C. 7:1-4-1 *Definitions.*

"Bulk Liquid" or "Bulk Semi-Liquid" means liquid or semi-liquid in the quantity of fifty-five (55) gallons or more.

"Chemical Waste" means discarded material-resulting from any manufacturing process or other procedure which is or can become chemically active.

"Department" means the Department of Environmental Protection.

"Hazardous Waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms, because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause detrimental cumulative effects. They shall include waste materials that are (1) toxic or poisonous; (2) corrosive; (3) irritating or sensitizing; (4) radioactive; (5) biologically infectious; (6) explosive; (7) flammable; and present a significant hazard to human health and/or the environment. They include, but are not limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 9-596) and those listed in Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

"Liquid Waste" means any waste which exists in the liquid state at standard conditions (70 F and 29.92 in Hg.).

"Pesticide" means any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing or mitigating any insects, rodents, nemotodes, predatory animals, fungi, weeds and other forms of plant or animal life or viruses, except viruses on or in living man or other animals. The term "pesticide" shall also include any substance or mixture of substances labeled, designed or intended for use as a defoliant, desicant or plant regulator.

"Recycling or Reclamation Facility" means any place, equipment, or plant designed and operated to collect, store, or process and to redistribute separated materials so as to return the material to the raw materials market.

"Resource Recovery Facility" means any place, equipment, or plant designed and operated to separate or process municipal solid waste into usable secondary materials, including fuel and heat.

"Secondary Material" means previously used raw material.

"Semi-Liquid" means solid matter in a liquid media (e.g., a slurry).

"Solid Waste" means garbage refuse, sludge, and other discarded solid materials resulting from industrial, commercial, and agriculture operations and from community activities, and all other waste materials including liquids disposed of incident thereto except solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

N. J. A. C. 7:1-4.2 *Out-Of-State Waste.*

No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:

(a) Garbage to be fed to swine in the State of New Jersey;

(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste and that is intended for a recycling or reclamation facility;

(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recoverd in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N. J. A. C. 7:1-4.3 *Effective Date.*

These rules shall take effect on February 1, 1974.

THE FOREGOING IS HEREBY ADOPTED AND EFFECTIVE THIS ——— DAY OF JANUARY, 1974.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

Filed January 22, 1974.

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Trenton, New Jersey 08608
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Attorneys for Plaintiffs.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
DOCKET No. L 15068.73 P. W.
Civil Action

CITY OF PHILADELPHIA, a municipal corporation of the Commonwealth of Pennsylvania, CITY OF GLEN COVE, a municipal corporation of the State of New York, LANDFILL AND DEVELOPMENT COMPANY, a New Jersey corporation, MAC SANITARY LANDFILL, INC., a New Jersey Corporation, KINSLEY'S LANDFILL, INC., a New Jersey corporation, and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a New Jersey Corporation,
Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants.

COMPLAINT
IN LIEU OF PREROGATIVE WRITS.

Plaintiffs, City of Philadelphia, c/o David J. Damiano, Commissioner, Department of Streets, 340 Municipal Services Building, Philadelphia, Pennsylvania, 19107, City of Glen Cove, c/o David Quient, Esq., City Attorney, 5 Highland Road, Glen Cove, New York, 11542, Landfill and Development Company, Route 38, R. D. #1, Mt. Holly, New Jersey, M. A. C. Landfill, Inc., Routes 41 and Clements Bridge Road, Deptford, New Jersey, Kinsley's Landfill, Inc., Routes 41 and 47, Deptford, New Jersey and DeLorenzo-Interstate Waste Removal Co., Inc., 208 Paterson Avenue, Trenton, New Jersey, in complaining against defendants, say:

COUNT I.

1. Plaintiff landfills are public utilities of the State of New Jersey and hold duly issued temporary certificates of public convenience and necessity issued by the New Jersey Public Utility Commission.

2. Each said landfill duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a sanitary landfill registration certificate pursuant to N. J. A. C. 7:26-2.2 &c.

3. Plaintiff Landfill and Development Company operates a sanitary landfill on a tract of land consisting of approximately 200 acres situated in the Townships of Mount Holly, Eastampton and Lumberton in the County of Burlington and State of New Jersey, which landfill site has been leased from plaintiff DeLorenzo-Interstate Waste Removal Co., Inc.

4. Plaintiff M. A. C. Landfill, Inc. operates a sanitary landfill on a tract of land consisting of approximately 87 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

5. Plaintiff, Kinsley's Landfill, Inc., operates a sanitary landfill on a tract of land consisting of approximately 380 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

6. Each landfill treats and disposes of solid waste which originated or was collected outside the State of New Jersey, including considerable solid waste collected in the City of Philadelphia, Pennsylvania.

7. Plaintiff City of Philadelphia has entered into a written agreement with each of the aforesaid plaintiff landfills for the treatment and disposal of a substantial portion of its solid waste. Plaintiff City of Glen Cove disposes of a substantial portion of the solid waste originating or collected in said city in sanitary landfills located in the State of New Jersey.

8. By virtue of the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 *et seq.*, the Department of Environmental Protection of the State of New Jersey was granted the power and authority to promulgate rules and regulations governing solid waste disposal in the State of New Jersey.

9. On February 21, 1973, the Governor of the State of New Jersey approved A. 1132 (P. L. 1973, c. 39) known as the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

10. Said Act, which became effective March 1, 1973, is entitled as follows:

> AN ACT to control and regulate the treatment and disposal within this State of solid and liquid waste collected outside the State, empowering the Commissioner of Environmental Protection to adopt rules and regulations and prescribing penalties for violations.

11. Pursuant to paragraph 4 of the Waste Control Act, the Commissioner of Environmental Protection is granted the power to prohibit "the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State". N. J. S. A. 13:1I-4a.

12. In accordance with the authority conferred by N. J. S. A. 13:1E-1 *et seq.* and N. J. S. A. 13:1I-1 *et seq.*, and as part of a proposed Revision to the Rules of the Bureau of Solid Waste Management, the Commissioner of Environmental Protection proposed as follows:

> 7:26-1.8 *Out of State Waste*
>
> —1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.
>
> —1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

13. The effect of the aforesaid portion of the proposed rule is to completely prohibit the disposal in the State of New Jersey of any solid waste which originated or was collected outside the territorial limits of the State.

14. The principal basis and background advanced by the Department of Environmental Protection to support the proposed prohibition was to assure the availability of landfill acres in New Jersey for solid waste generated in this State, and as an incident thereto, to stabilize the cost of solid waste collection and disposal for New Jersey residents.

15. The power and authority to regulate the rates and public utility aspects of the solid waste collection and disposal industry has been conferred upon the Board of Public Utility Commissioners pursuant to the Solid Waste Utility Control Act of 1970, N. J. S. A. 48:13A-1 *et seq.*

16. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and an unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

17. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State; and there is no difference with respect to the treatment or disposal of same.

18. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 hereof, if adopted and enforced, would be and constitute an undue burden upon interstate commerce in violation of Art. 1, Sec. 8., Cl. 3 of the United States Constitution.

19. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

20. Plaintiffs will suffer immediate and irreparable injury, loss or damage if the proposed rule prohibiting the importation of out-of-state waste set forth in paragraph 12 hereof is adopted and enforced.

21. In the event plaintiff landfills are prohibited to dispose of solid waste which originated or was collected outside the territorial limits of this State, the continued operation of said sanitary landfills may be and become economically unfeasible, thereby impairing the public interest.

22. Plaintiffs must obtain equitable relief because they do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT II.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out of state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT III.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on the face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and

successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT V.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 4, Sec. 7, Par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayer for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C.-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an arbitrary, capricious and unreasonable exercise of power by an administrative agency, thereby denying plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive of the First Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. The New Jersey Legislature has conferred sweeping authority upon appropriate public bodies to regulate the treatment and disposal of solid waste in New Jersey, for the purpose of assuring a sanitary method of disposing of solid waste and thereby protecting the public health, safety and welfare.

3. N. J. S. A. 26:1A7 provides, in part, that the Public Health Council, established within the Department of Health of the State of New Jersey, shall have power to establish reasonable sanitary regulations, and that the body of regulations so established shall be called the State Sanitary Code.

4. By virtue of said authority and in accordance with the applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, a revision of Chapter VIII of the State Sanitary Code, exclusively concerned with re-

fuse disposal, was adopted by the Public Health Council to become effective July 1, 1970.

5. Section 6 of the Solid Waste Management Act (1970) N. J. S. A. 13:1E-6b provides, in pertinent part, as follows: "All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department (of environmental protection), subject to its power as herein provided to amend or repeal the same."

6. By virtue of the authority granted by the applicable provisions of the Solid Waste Management Act (1970), (N. J. S. A. 13:1E-1 *et seq.*) and the Waste Control Act (N. J. S. A. 13:1I-1 *et seq.*) and in accordance with applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, the Department of Environmental Protection held hearings in two parts during December, 1973 on proposed solid waste management regulations.

7. Said proposed regulations do not expressly amend or repeal Chapter VIII of the State Sanitary Code.

8. In addition to the aforesaid, N. J. S. A. 13:1E-17, being a supplement to the Solid Waste Management Act (1970) provides, in pertinent part, as follows: "No ordinances or regulations of any governing body of a municipality or county or board of health more stringent than this act or any rules or regulations promulgated pursuant hereto, and relating to health and environmental protection aspects of solid waste collection or solid waste disposal, shall be superseded by this act."

9. A similar provision with respect to the provisions of the State Sanitary Code was enacted in 1947, N. J. S. A. 26:1A-9.

10. On January 2, 1974, the Governor of the State of New Jersey approved S. 2367 (P. L. 1973, c. 363) being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

11. Said Act, which will become effective February 1, 1974, is entitled as follows:

> An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

12. The text of said Act provides as follows:

(1) The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

(2) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations

permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973. c. 39.

13. In enacting a law prohibiting the importation of out-of-state waste, the principal concern of the New Jersey Legislature was to preserve landfill acres in New Jersey for solid waste generated in this State.

14. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within this State; and there is no difference with respect to the treatment or disposal of same.

15. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and the unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

16. Inasmuch as the disposal of solid waste is a problem of national scope and concern, the Congress of the United States has directed the Secretary of Health, Education and Welfare to encourage interstate and interlocal cooperation in connection with solid waste disposal problems. 42 U. S. C. A. § 3254.

17. P. L. 1973, c. 363 constitutes an undue burden upon interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the United States Constitution.

18. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

19. Plaintiffs repeat the allegations contained in paragraphs 20 through 22 inclusive of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IX.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive, and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes the taking of private property for public use without just compensation in violation of Amendment 5 and Amendment 14 of the United States Constitution.

WHEREFORE, plaintifis demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT X.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363, constitutes the taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs, demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contracts, in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contract in violation of Art. 4, Sec. 7, par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Inasmuch as more than one object is embraced by P. L. 1973, c. 363, said enactment violates Art. 4, Sec. 7, Par. 4 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Section 2 of P. L. 1973, c. 363 contains an unconstitutional delegation of legislative power in violation of Amendment 14 of the United States Constitution, and Art. 4, Sec. 1, Par. 1, of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is so vague and uncertain as to deny plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is violative of due process of the law as constituting an arbitrary, capricious and unreasonable exercise of power by the Legislature, as provided in Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is void for failure to provide adequate standards to an administrative agency in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIX.

1. N. J. S. A. 13:1I-4a provides as follows:

> The commissioner shall have the power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

2. The power to prohibit, as distinguished from the power to regulate, the incineration or landfill of solid waste and the treatment or disposal of liquid waste has been preempted by the federal government.

WHEREFORE, plaintiffs demand judgment:

a. Declaring the grant of power to prohibit the treatment or disposal of solid and liquid waste contained in N. J. S. A. 13:1I-4a unconstitutional.

b. That this Court grant costs of suit; and

c. That such other relief be granted by the Court as seems to it just and equitable.

Jamieson, Walsh, McCardell, Moore & Peskin
A Professional Corporation
By /s/ HERBERT F. MOORE
Herbert F. Moore

AFFIDAVIT OF VINCENT SUOZZI.

(January 10, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation, and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW YORK }
COUNTY OF NASSAU } *ss.:*

VINCENT SUOZZI, being duly sworn, deposes and says:

1. I am the Mayor of the City of Glen Cove, New York, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a

motion for an order temporarily restraining the enforcement of S. 2367, as enacted by the State of New Jersey, and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. Enforcement of S. 2367, or adoption and enforcement of proposed N. J. A. C. 7:26-1.8, would prohibit the treatment or disposal in New Jersey of solid waste generated or collected outside that State.

4. A substantial portion of the solid waste which originates or is collected in the City of Glen Cove is treated and disposed of in the State of New Jersey.

5. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974, (a) promulgate regulations permitting and regulating the treatment and disposal of solid and liquid waste in the State of New Jersey, and (b) determine that solid or liquid waste which originated or was collected outside the State of New Jersey may be brought into said State without endangering the public health, safety and welfare, then the City of Glen Cove will have to find a suitable alternate plan for the disposal of its solid waste.

6. A suitable alternate plan cannot be developed prior to February 1, 1974, or in the foreseeable future.

7. Unless defendants are enjoined and restrained during the pendency of this action from prohibiting the treatment and disposal in New Jersey of waste collected outside of that State, plaintiff, City of Glen Cove, will suffer great and irreparable damage, in that solid waste

will accumulate in said city and cause a serious hazard to the health, safety and welfare of the people thereof.

VINCENT SUOZZI
Vincent Suozzi

Sworn to and subscribed before me this 10th day of January, 1974.

DAVID QUIENT
David Quient, Notary Public
State of New York #30-8466700
Commission expires 3/30/74

AFFIDAVIT OF SAMUEL HALE.

(January 15, 1974.)

STATE OF MASSACHUSETTS
COUNTY OF SUFFOLK } *ss.:*

I, Samuel Hale, being duly sworn, depose and say, under the penalties and pains of perjury:

1. That I am a Vice President of SCA Services, Inc. ("SCA"), a nationwide waste service company with over 90 waste service operating centers located in 35 states;

2. That, prior to the commencement of my employment with SCA on October 3, 1973, I was, from October 1, 1971, Deputy Assistant Administrator for Solid Waste Management Programs of the United States Environmental Protection Agency;

3. That, to the best of my knowledge and belief, substantial quantities of chemical wastes, predominately liquid, generated within the State of New Jersey have been and are continuing to be transported to and disposed of within states other than the State of New Jersey, including, without limitation, the States of New York, Connecticut, Pennsylvania and Maryland;

4. That, to the best of my knowledge and belief, there is pending before the United States Senate, Senate Bill 1086, known as the "Hazardous Waste Management Act of 1973", proposed by the Administration, which, in Section 14(b) thereof, contains provisions which, if enacted, would limit the powers of states and municipalities to prohibit the importation of hazardous wastes. A copy of said Section 14(b) is attached hereto as Exhibit A;

5. That, to the best of my knowledge and belief, there is pending before the United States Senate, Senate Bill 1879, as revised, known as the "Solid Waste Source Reduction and Recycling Incentives Act of 1973", proposed by the Senate Commerce Environment Subcommittee, which, if enacted, would prohibit "restrictions on interstate transport of wastes for treatment or disposal . . ." (*Solid Waste Report*, November 26, 1973).

In witness whereof, I have hereunto set my hand this 15th day of January, 1974.

SAMUEL HALE
Samuel Hale

Subscribed and sworn to before me this 15th day of January, 1974.

SAMUEL P. HUNT, III
Samuel P. Hunt, III
Notary Public
My Commission Expires: Dec. 27, 1980

Exhibit A.

STATE AUTHORITY

SEC. 14.

• • •

(b) No State or municipality shall impose, on wastes originating in other States or municipalities, requirements respecting the transport of such wastes into or disposal within its jurisdiction which are more stringent than those requirements applicable to wastes originating within such receiving States and municipalities.

• • •

AFFIDAVIT OF DAVID J. DAMIANO.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation, and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath says:

1. I am the Commissioner of the Department of Streets of the City of Philadelphia, Pennsylvania, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforce-

ment of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. P. L. 1973, c. 39 prohibits the treatment and disposal within the State of New Jersey of all wastes generated outside of said state, and further provides, in pertinent part, as follows:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

4. Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management by the Commissioner of the Department of Environmental Protection provide that no person engaged in the collection and/or haulage of solid waste shall dispose of, and no person owning or operating a solid waste facility located within the State of New Jersey shall accept for disposal any solid waste which originated or was collected outside the State of New Jersey.

5. A substantial portion of the solid waste which originates or is collected in the City of Philadelphia is treated and disposed of in the State of New Jersey.

6. The City of Philadelphia has entered into written agreements with Landfill and Development Company,

M. A. C. Landfill, Inc. and Kinsley's Landfill, Inc., public utilities of the State of New Jersey which hold temporary or permanent registration certificates duly issued by the New Jersey Department of Environmental Protection for the treatment and disposal of the solid waste originating in or collected in Philadelphia.

7. P. L. 1973, c. 363 will become effective February 1, 1974.

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to that date (a) determine that solid or liquid waste originating from outside of New Jersey can be brought into said state without endangering the public health, safety and welfare, and (b) promulgate regulations permitting and regulating the treatment and disposal of foreign waste, then the only alternative presently available to the City of Philadelphia would be to incinerate its solid waste. The incinerators located within the City of Philadelphia if operated would presently violate Federal Air Pollution Standards, and, if used, would create a serious and hazardous air pollution problem involving the City of Philadelphia, the Commonwealth of Pennsylvania and the State of New Jersey, and would endanger the health and welfare of the inhabitants thereof. Under present air pollution standards, the lawful and safe operation of the said incinerators cannot be obtained within the foreseeable future.

9. There are no other alternative facilities available for the disposal of the solid waste originating in the City of Philadelphia other than the facilities located within the State of New Jersey, at the present time.

10. In any event, if other suitable facilities could be located at some future date, the City of Philadelphia does not own a sufficient number of suitable vehicles to trans-

port said solid waste material for disposal. Vehicles suitable for the transportation of solid waste material are not inordinately expensive, but are custom vehicles, constructed in accordance with rigid specifications, which must be specially ordered. The said vehicles are not readily available for purchase in the open market. There is at this time, a minimum 400 day waiting period required for delivery of said vehicles, absent strikes, availability of material, or other contingencies beyond purchaser's control.

11. Unless defendants are enjoined and restrained from prohibiting the treatment and disposal in New Jersey of waste collected outside of that state, the City of Philadelphia will suffer great, immediate and irreparable damage, in that solid waste will accumulate in said City and cause a serious hazard to the health, safety and welfare of the people thereof.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 16th day of January, 1974.

JANET ALTHOUSE
Janet Althouse
Notary Public,
Philadelphia, Philadelphia Co.
My Commission Expires February 5, 1977

AFFIDAVIT OF RICHARD A. PELUSO.
(January 16, 1974.)

A Professional Corporation
JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
One West State Street
Trenton, N. J. 08608
(609) 396-5511

Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed almost all course work toward a doctor's degree in said field.

3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health; welfare or safety of the residents of the State of New Jersey.

5. As a general rule, there is a direct relationship between the length of time consumed in bringing a sanitary landfill to final grade including placement of the final impermeable cover thereon, and the potential for environmental pollution.

6. If the effect of P. L. 1973, c. 363, or proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 is to reduce the volume of solid waste treated and disposed of in New

Jersey and thereby extend the time within which landfills are brought to final grade and final cover then such statute and proposed rules may have the effect of increasing, rather than decreasing such danger as may exist to the quality of the environment.

7. In the event the court would grant restraints enjoining the enforcement of P. L. 1973, c. 363, or the adoption or enforcement of proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, the public health, welfare and safety would no no way be jeopardized provided said waste continued to be treated and disposed of in accordance with the terms of applicable Federal and New Jersey state and administrative laws, rules and regulations.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 16th day of January, 1974.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn according to law, upon his oath says:

1. I am the President of Landfill and Development Company (hereinafter L & D), a public utility of the State of New Jersey holding a duly issued temporary Certificate of Public Convenience and Necessity by the New Jersey

Public Utilities Commission. L & D duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a Sanitary Landfill Registration Certificate, and a temporary certificate was duly issued by said Department.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. The disposal of solid waste is governed by Chapter VIII, "Refuse Disposal" of the New Jersey State Sanitary Code, which Code is enforced by the aforesaid Department of Environmental Protection.

4. In accordance with authority conferred by N. J. S. A. 13:1E-1 et seq. and N. J. S. A. 13:1I-1 et seq., the said Department of Environmental Protection proposed a comprehensive revision to the Rules of the Bureau of Solid Waste Management which would further govern and regulate the operation of sanitary landfills in New Jersey, including the treatment and disposal of solid waste therein.

5. L & D has entered into a written contract with the City of Philadelphia pursuant to which L & D has agreed to treat and dispose of a stated quantity of solid waste which originates or is collected in said City.

6. Section 7:26-1.8.2, being one section in the aforesaid proposed Revision to the Rules of the Bureau of Solid Waste Management, provides that,

"no person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside of the territorial limits of this State."

7. In addition, P. L. 1973, c. 363 which will become effective February 1, 1974, provides that no wastes generated outside of the State of New Jersey shall be treated or disposed of within said State, and further provides as follows:

"No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974 (a) determine that waste which originates or was collected outside of New Jersey can be disposed of within said state without endangering the public health, safety and welfare and (b) promulgates regulations permitting and regulating the treatment and disposal of such waste, then L & D will be prohibited from the further treatment and disposal of waste in accordance with the terms of its written contract with the City of Philadelphia.

9. If L & D is prohibited from fulfilling the terms of its obligations with the City of Philadelphia, it will lose very substantial and considerable profits, and will suffer

grievous damages, the amount of which cannot be calculated with any reasonable certainty.

Based upon existing regulations governing the treatment and disposal of solid waste, the State of New Jersey will not be materially or substantially adversely affected by the issuance of a temporary restraining order, while on the other hand, the business of L and D would be grievously and substantially affected if such restraining order was not granted.

10. Upon information and belief the proposed Rule 7:26-1.8.2 and P. L. 1973, c. 363 was motivated by a desire on the part of the State of New Jersey to assure the availability of landfill acres in New Jersey for solid waste generated in that state and, as an incident thereto, to stabilize the cost of solid waste disposal for New Jersey residents. Said information and belief is based upon (a) a statement by the New Jersey Department of Environmental Protection appearing on pages 7 and 8 of a document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", a copy of which section is attached hereto and made part hereof as Exhibit A, and, (b) the last paragraph of a letter dated December 16, 1973 from Richard W. DeKorte, Counsel to the Governor to David Quient, Esquire, City Attorney of the City of Glen Cove, which states that S. 2367 (O. C. R.) (now P. L. 1973, c. 363) would not be introduced "had the sister states of New Jersey permitted solid wastes originating in our state to be disposed of at or near the point of origination." A copy of said letter is attached hereto and made part hereof as Exhibit B.

11. Accordingly, both P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 appear to be retaliatory in nature and not actually based

upon the immediate potential for harm to the health of the community.

12. Federal legislation encourages interstate and regional solutions, where applicable, to solid waste disposal and recovery as evidenced by 42 U. S. C. A. § 3254, a copy of which is attached hereto as Exhibit C.

13. In addition to the aforesaid, if L & D is prohibited from disposing of solid waste which originated or was collected outside of New Jersey, the continued operation of said sanitary landfill may be and become economically unfeasible, thereby impairing the public interest.

LEO F. HUGHES, 3RD
Leo F. Hughes, 3rd

Sworn to and subscribed before me this 16th day of January, 1974.

ARTHUR MEISEL
Arthur Meisel
Attorney at Law of New Jersey

Exhibit A.

• • •

IV. *Out-of-State Waste*

In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that

same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

• • •

Exhibit B.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel for the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 13, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Richard W. DeKorte
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

Exhibit C.

§ 3254. Encouragement of interstate and interlocal cooperation

The Secretary shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; encourage, where practicable, interstate, interlocal, and regional planning for, and the conduct of, interstate, interlocal, and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal.

JAMIESON, WALSH McCARDELL,
MOORE and PESKIN
A PROFESSIONAL CORPORATION
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
Docket No. L-15068-73 P. W.
CIVIL ACTION

CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa., CITY OF GLEN COVE, a municipal corp. of the State of N. Y., LANDFILL and DEVELOPMENT COMPANY, a N. J. corp., MAC SANITARY LANDFILL, INC., a N. J. corp., KINSLEY'S LANDFILL, INC., a N. J. corp. & DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corp.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Arthur Meisel, Esquire, attorneys of the plaintiffs, notice having been informally given to the Office of the Attorney General of New Jersey, and it appearing to the Court from the duly verified complaint and the affidavits annexed thereto that immediate and irreparable damage will probably result to the plaintiffs before a hearing can be had on an application for a temporary restraining order in this action:

It is on this 21st day of January, 1974,

ORDERED, that the defendants show cause before the Superior Court, Law Division, at the Mercer County Court House, South Broad and Market Streets, Trenton, N. J. on the 1st day of February, 1974 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard why an injunctive order should not be issued restraining and enjoining the defendants according to the demand of the complaint until the final hearing of this action.

IT IS FURTHER ORDERED, that the defendant, Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management and that the State of New Jersey desist and refrain from enforcing the provisions of P. L. 1973, c. 363 until the constitutionality of same has been determined, and that said restraints apply to defendants and their agents, employees, servants and attorneys.

IT IS FURTHER ORDERED, that the defendants have leave to move for a dissolution or modification of the restraints hereby imposed on 2 days notice to the plaintiffs.

IT IS FURTHER ORDERED, that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendants within 2 days from the date hereof.

GEORGE Y. SCHOCH

J. S. C.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove, a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp., Kinsley's Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT.

DISTRICT OF COLUMBIA } *ss.:*

ARSEN J. DARNAY, of full age, being duly sworn according to law, deposes and says:

1. I am the Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency.

2. The statements on the attached letter to Mr. Herbert F. Moore dated January 29, 1974 are all true to my personal knowledge.

ARSEN J. DARNAY
Arsen J. Darnay

Sworn to and Subscribed before me this 29 day of January, 1974.

A. BLAKEMAN EARLY
A. Blakeman Early
Attorney at Law of the District of Columbia

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

Mr. Herbert F. Moore, Esq.
Jamieson, Walsh, McCardell, Moore and Peskin
One West State Street
Trenton, New Jersey 08608

Dear Mr. Moore:

In connection with current litigation in which you are engaged with the State of New Jersey, you have requested a statement of this Agency's position on the legislative action by the State of New Jersey which will prohibit as of February 1, 1974, the importation into the State of any solid or liquid waste originating or collected outside the State. I understand also that the State has adopted under its emergency procedures implementing regulations which with some narrow exceptions, will ban importation for land disposal of any such waste. Thus, it would appear that the treatment and disposal within New Jersey of most wastes generated outside the State will be illegal and subject to severe enforcement penalties as of February 1, 1974.

It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute and these regulations.

If this statute and implementing regulations are allowed to become effective February 1, the City of Philadelphia would significantly increase and continue the in-

cineration of its solid waste. The incineration of such quantities of solid waste would result in the emission of particulate matter in violation of health related air quality standards and the Clean Air Act of 1970. (See Affidavit of Mr. David J. Damiano, Commissioner of Streets, City of Philadelphia, page 3.)

Representatives of EPA have testified on two occasions on other proposals to ban the importation and disposal in New Jersey of out-of-state wastes. Copies of the statements of Meyer Scolnick before the Hackensack Meadowlands Development Commission on June 18, 1973, and of John A. Ruf before the New Jersey Department of Environmental Protection on December 13, 1973, are enclosed. These statements, together with this letter, represent the position of the Environmental Protection Agency. Copies will be distributed to the State and to others who have expressed an interest in this matter.

In brief, EPA's position is that a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act, the administration of which law is an EPA responsibility. The EPA Administrator is charged with encouraging (1) cooperative activities by the States and local governments in connection with solid waste disposal programs; (2) interstate, inter-local, and regional planning for, and the conduct of, interstate, inter-local and regional waste disposal programs; and (3) the enactment of improved and, so far as practical, uniform state and local laws governing solid waste disposal. The New Jersey legislation will work at cross purposes with the plans and goals EPA is striving to implement under the role given to it by the Solid Waste Disposal Act. Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number

of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

While the concerns of the several States as to the growing scarcity of landfill disposal sites are understandable, restrictions on out-of-state wastes reflect a narrow, parochial view without due regard to more significant problems and values involved in the national policy in favor of regional planning for solid waste disposal consistent with the achievement of environmental quality goals on a regional basis in this and the related environmental areas in which EPA is making efforts to combat water pollution under the Federal Water Pollution Control Act Amendments of 1972 and air pollution under the Clean Air Act. Environmental planning in the opinion of this Agency means regional planning and not restrictive legislation by a jurisdictional entity in its own short-range self interest. This means that solid waste processing and disposal facilities should be planned, designed and constructed so as to serve "waste sheds" which may encompass more than one city or State, and not merely the jurisdictional entity in which it is located or in which the waste is generated.

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

The control of available landfill sites development in light of land use planning as reflected in State laws, regulations and policies in such areas as "wetlands" preservation, area development (such as in the Hackensack Meadowlands), open-space, recreational, agricultural and park area designations and zoning and growth develop-

ment planning are admirable efforts of environmental control provided such efforts take into account the total environmental picture and address the significant problems of air quality, water quality, waste water treatment as well as solid waste treatment and disposal. A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices.

Sincerely yours,

ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator
for Solid Waste Management Programs
(HM-562)

AFFIDAVIT OF MILTON BERKES.

(January 29, 1974.)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } ss.:

Milton Berkes being duly sworn upon his oath according to law deposes and says:

1) I am a Legislator from the 140th Assembly District of the Commonwealth of Pennsylvania elected from Bucks County.

2) I have personal knowledge of the matters contained herein.

3) I have, this twenty-ninth day of January, 1974, introduced into the House of Representatives of the Commonwealth of Pennsylvania a bill designated as House Bill No. 1831, a true copy of which is attached hereto and made a part hereof.

4) The intent of this legislation is to retaliate against any state that refuses to accept solid or liquid waste, for treatment or disposal, that originates within the Commonwealth of Pennsylvania.

MILTON BERKES
Milton Berkes

Sworn and subscribed to before me, a notary public of the Commonwealth of Pennsylvania this 29th day of January, 1974.

EUNICE F. JOHNSON
NOTARY PUBLIC
My Commission Expires Sept. 13, 1976
Hershey, Pa. Dauphin County

AN ACT

Amending the act of July 31, 1968 (P. L. 788, No. 241), entitled "An act providing for the planning and regulation of solid waste storage, collection, transportation, processing and disposal systems; requiring municipalities to submit plans for solid waste management systems in their jurisdiction; authorizing grants to municipalities; requiring permits for operating processing or disposal systems; imposing duties on and granting powers to municipalities; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies, prescribing penalties, and making an appropriation," prohibiting the treatment and disposal within the State of solid waste collected from a state that does not accept waste from this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6, act of July 31, 1968 (P. L. 788, No. 241), known as the "Pennsylvania Solid Waste Management Act," is amended by adding a clause to read:

Section 6. Powers and Duties of the Department.—The department shall have the power and its duty shall be to:

• • •

(10) Develop methods to identify the source of any solid waste which is part of the process of a solid waste management system to prevent any solid waste collected from another state that does not accept solid waste from this Commonwealth from being processed as part of such solid waste management system.

Section 2. Section 7 of the act is amended by adding a subsection to read:

Section 7. Applications and Permits.—• • •

(f. 1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 3. Section 9 of the act is amended by adding, before the last paragraph, a clause to read:

Section 9. Prohibited Acts.—It shall be unlawful for any person, municipality, county, or authority to:

• • •

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 4. This act shall take effect immediately.

AFFIDAVIT OF JOHN P. FAZZIO.

(January 30, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DE LORENZO–INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

I, JOHN P. FAZZIO, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am the President of John P. Fazzio, Inc., trading as John P. Fazzio Landfill Co., a solid waste disposal utility of the State of New Jersey.

2. I make this affidavit in support of a Motion for Intervention in the above-captioned matter and I have personal knowledge of the matters hereinafter referred to.

3. Since 1969 the John P. Fazzio Landfill Co. has been accepting waste that has been generated within the State of Pennsylvania and this has been done under the regulation of the New Jersey Department of Environmental Protection.

4. About seventy-five (75%) per cent of all waste deposited at the John P. Fazzio Landfill Co. originates in the State of Pennsylvania.

5. If P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 are enacted, it will cause serious, immediate and irreparable injury to John P. Fazzio Landfill Co. and could cause John P. Fazzio Landfill Co. to go into bankruptcy because of these severe and abrupt reductions in revenue. If John P. Fazzio Landfill Co. did become bankrupt and had to go out of business because of the enactment of P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, it would have damaging effects upon the various municipalities in the State of New Jersey who use the disposal services of the John P. Fazzio Landfill Co.

6. Furthermore, if P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 are enacted, it will have a serious effect upon the numerous waste collectors who collect waste in the State of Pennsylvania and deposit said wastes in the State of New Jersey. Furthermore, the enactment of P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 may have the effect of placing these waste collectors in a situation in which they will have no place to deposit their said wastes.

7. The lack of adequate and sufficient disposal areas in the State of Pennsylvania could cause a severe health crisis to the residents of the City of Philadelphia, in particular those residents of the City of Philadelphia who have their solid waste collected by collectors who dispose of same in the State of New Jersey.

JOHN P. FAZZIO.
John P. Fazzio.

Sworn and subscribed to before me this 30th day of January, 1974.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF DAVID L. BENNETT.

(January 30, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DE LORENZO—INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

I, DAVID L. BENNETT, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I am the President of Continental Vanguard, Inc., a waste collection utility of the State of New Jersey.

2. I make this affidavit in support of a Motion for Intervention in the above-captioned matter and I have personal knowledge of the matters hereinafter referred to.

3. Continental Vanguard, Inc. collects wastes from various companies and corporations located within the State of Pennsylvania.

4. Continental Vanguard, Inc. provides waste removal services to companies and corporations that are located within the State of Pennsylvania which manufacture and process commodities which are destined for interstate commerce.

5. The collection and removal of these wastes from said companies and corporations that are located within the State of Pennsylvania which manufacture and process commodities which are destined for interstate commerce are necessary and vital to the continued manufacture and processing of these said commodities.

DAVID L. BENNETT.
David L. Bennett.

Sworn and subscribed to before me on this 30th day of January, 1974.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF BERNHARDT V. LIND.

(January 30, 1974.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

BERNHARDT V. LIND, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Chief of the Bureau of Solid Waste Management within the Department of Environmental Protection. In that position I am responsible for the administration of the Department's programs with respect to the management of solid waste collection and disposal in New Jersey.

2. The figures available to the Department indicate that the present volume of solid waste being brought into New Jersey for disposal from the City of Philadelphia is approximately 10,000 tons a week.

3. The figures available to the Department indicate that the volume of solid waste being brought into New Jersey for disposal from New York is significantly in excess of 10,000 tons a week. The Hackensack Meadowlands Development Commission has found, by actual count, that 10,000 tons a week from New York were being disposed of within the Hackensack Meadowlands District alone prior to the initiation of a ban on out-of-state dumping in that area. Much of the garbage previously disposed of in the Hackensack Meadowlands District is now being disposed of elsewhere in New Jersey.

4. Proposed rule N. J. A. C. 7:26-1.8.1 and 1.8.2 have been superseded by L. 1973, c. 363 and will not be adopted by the Department of Environmental Protection. N. J. A. C. 7:1-4 was adopted by the Department as an

emergency measure pursuant to L. 1973, c. 363 and the emergency procedure contained in the Administrative Procedure Act.

5. The ban on the disposal of out-of-state waste within New Jersey will increase State-wide landfill life by approximately 8 percent. In specific areas, or with respect to specific landfills, the ban substantially increased the capacity available for disposal of wastes, in some instances as much as 50 to 100 percent. In Middlesex County an actual survey made by the Department indicated that the ban would extend landfill life in that county by 20 percent.

6. It is extremely difficult to estimate accurately existing landfill capacity, but the Department's best estimate is that existing capacity in north Jersey is about 3 years, and in south Jersey as much as 10 years.

7. One of the difficulties in estimating total State-wide or regional landfill capacity is that many landfills in the State are located in environmentally sensitive areas such as floodplains, wetlands, or on State-owned public trust tidelands, and their operation may soon be limited or discontinued for environmental reasons. Such discontinuance will obviously decrease even further the availability of landfill sites for disposal of New Jersey wastes.

8. The cost of removing garbage from New Jersey landfills and transporting it back to the state of origin is conservatively estimated to be about $30.00 a ton, and it is probably much more. The Department is aware of a recent estimate of the cost to remove garbage from a north Jersey landfill. That estimate is $35.00 a ton.

9. The facts set forth in the Basis and Background document promulgated with the Department's proposed revision of solid waste management regulations are, upon information and belief, true.

BERNHARDT V. LIND.
Bernhardt V. Lind.

Sworn to and subscribed before me this 30th day of January, 1974.

THERESA A. CRAMER
Theresa A. Cramer
Notary Public of N. J.
My Commission Expires Sept. 12, 1976

BASIS AND BACKGROUND FOR THE PROPOSED RULES OF THE BUREAU OF SOLID WASTE MANAGEMENT.

I. *General.*

In May of 1970, Governor Cahill signed into law the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 et seq., setting forth the statutory authority for the statewide control and supervision of solid waste collection, disposal and utilization. The New Jersey Department of Environmental Protection, through its Bureau of Solid Waste Management, implements those solid waste regulations. The Bureau's objectives are to minimize environmental damage resulting from the management of solid wastes, and to maximize the conservation of our resources through resource recovery.

Initially, the Department of Environmental Protection was faced with a system of solid waste collection and disposal which consisted of approximately 400 known disposal sites and thousands of collectors and haulers. The disposal sites, almost all of them landfills, were operating with the minimum of controls. Less than 10 percent could reasonably be considered sanitary landfills. On July 1, 1970, Chapter VIII of the New Jersey State Sanitary Code (Refuse Disposal) was revised to require the registration of all solid waste disposal operations and the submission of engineering designs by all landfills to the Department for review.

Implementation of Chapter VIII improved the land disposal operations, as well as provided the State with new statistical data concerning the impact of solid waste collection and disposal. For example, open burning of wastes as a method of disposal, and the depositing of solid wastes directly into our surface waters has become a rare occurrence. However, rapidly increasing generation of solid waste, the growing concern for the depletion of our land resources, and increasingly sophisticated technology in solid waste management necessitates the replacement of Chapter VIII with more comprehensive rules and regulations.

Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly "sanitary" involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same "natural" gas used in cooking and heating.

The technical and environmental problems related to solid waste management make clear the need for sound solid waste planning, and for the implementation of an orderly statewide plan for the collection, utilization, and disposal of our wastes. In 1970 the Department published the *New Jersey Solid Waste Management Plan,* calling for the establishment of regional solid waste collection and disposal systems. The regional concept is still valid and the need for its implementation becomes more evident daily. The Solid Waste Management Act (1970) mandates a registration priority for collection and disposal operations which conform with State and regional plans. The Bureau of Solid Waste Management constantly finds itself in need for valid sources of uniform data describing the current state of solid waste collection disposal in New Jersey.

At the cornerstone of planning for, and implementing, regional systems is solid waste collection. While the collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs, the Department of Environmental Protection currently has no standards governing this vital aspect of solid waste management. Past studies indicate that our current systems are anything but orderly and efficient. Frequently, two, and sometimes three collection vehicles travel the same streets collecting refuse and those same collection vehicles often travel long distances to disposal sites even though they are designed for collection, and not for long distance haulage.

The County and Municipal Government Study Commission has clearly defined what is commonly called New Jersey's solid waste crisis. The Commission's report, *Solid Waste: A Coordinated Approach*, (September, 1972) indicates that the 9,880 acres of land then available for landfill are being used at the rate of 783 acres per year. Over 40,000 tons of solid waste are buried in New Jersey each day, and this figure is increasing at an alarming rate.

II. *Sanitary Landfill in New Jersey.*

There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered "marginal." Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.

Most of the requirements for the operation of sanitary landfills which were contained in Chapter VIII have been duplicated in the proposed regulations. A number of requirements, however, have been strengthened or reworded to reflect the original purposes of Chapter VIII. A true sanitary landfill, for instance, requires daily or more frequent soil cover. Cover material controls the emergence of flies from the fill, discourages rodent burrowing and reduces the attraction of the waste to birds. In addition, soil cover acts as a fire break and helps prevent the blowing of papers and other lightweight materials. Chapter VIII currently permits a small area on the landfill to remain uncovered for as long as three days for convenience in facilitating truck movement. It is felt that the benefits of daily cover far outweigh the relatively rare instances in which cover may interfere with truck movement. For that reason, the proposed regulations require all solid waste to be covered on at least a daily basis (see 7:26-2.5.13).

Still another cover problem which may arise involves the sanitary landfill operation which is dependent upon an outside source, or upon one particular piece of machinery, for its cover. The proposed regulations require the stockpiling of at least a 10-day supply of cover material near the active fill area (7:26-2.5.27) to ensure a source of cover in the event cover becomes unavailable for a short period of time, and to allow time for alternate arrangements to be made if necessary.

Providing cover material at a sanitary landfill on a daily or more frequent basis also minimizes odor problems at the site. While the existing Chapter VIII of the New Jersey State Sanitary Code requires the control of odors when previously deposited solid waste must be excavated, no provision was made for odor problems at active operations. The proposed regulations include an odor control

standard for active sanitary landfills (7:26-2.5.8) that is consistent with existing Department regulations dealing with the prohibition of air pollution (N. J. A. C. 7:27-5.1 et seq.).

The provisions of Chapter VIII governing the termination of sanitary landfills have also been expanded in recognition of the problems sometimes encountered at completed landfills which are not properly maintained. The proposed regulations require the continued maintenance of discontinued landfills by the property owner of record and, in addition, require the filing of detailed information concerning the landfill with the County Hall of Records in order that prospective landowners be made aware of the site's previous use as a sanitary landfill.

In addition, the proposed regulations would permit only those vehicles registered in accordance with the subchapter governing collection to deposit their wastes at the active operating area of the fill (7:26-2.5.19). Unregistered vehicles (such as family passenger automobiles) would be accommodated at containers located away from the active operation (7:26-2.5.20). The active operating area of a sanitary landfill accommodates heavy operating equipment, and this requirement is proposed for safety reasons.

Leachate.

Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequency likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill "sponge."

Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

Characteristics of the Leachate From a Bin Study on Municipal Refuse

Constituents	*Initial sample*	*1 year and 2 months following initial dosing*	*2 months following initial dosing*
pH	6.55	NR	7.18
Total hardness (as $CaCO_3$)*	890	7,250	695
Alkalinity (as $CaCO_3$)	730	6,680	2,080
Calcium	240	2,190	135
Magnesium	64	340	105
Sodium	85	1,470	530
Potassium	28	1,115	520
Total iron	6.5	270	40
Ferrous iron	NR	68	4.1
Chloride	96	1,810	755

Constituents	*Initial sample*	*2 months following initial dosing*	*1 year and 2 months following initial dosing*
Sulfate	84	560	54
Phosphate	0.30	9.6	5.6
Organic nitrogen	2.4	320	22
Ammonia nitrogen	0.22	790	175
BOD	NR	33,100	125

* Measurements in mg/1.

(State of California, Report on the Investigation of Leaching of a Sanitary Landfill, State Water Pollution Control Board, Publ. No. 10, 1954.)

While examples of leaching sanitary landfills have been studied and documented for many years, only recently have researchers begun to study leachate generation in detail. As recently as 1972, the U. S. Environmental Protection Agency, in its report entitled "Sanitary Landfill Design and Operation," stated the following:

> "Some investigators believe that even in a sanitary landfill, leachate production is inevitable and that some leachate will eventually enter surface water or groundwater. This has not been proven but neither has the opposite view. The present philosophy held by the Office of Solid Waste Management Programs, most State solid waste control agencies, and many experts in the field is that through sound engineering and design, leachate production and movement may be prevented or minimized to the extent that it will not create a water pollution problem."

One particularly disconcerting feature of leachate production is the time delay created by the absorptive character of the wastes. Frequently, landfills do not begin leaching until some time after the fill has been completed and the waste has reached its saturation level. Climatic conditions in New Jersey are favorable to leachate production and, unless extreme measures are taken to prevent any liquid from infiltrating the waste, leachate will be produced in New Jersey's landfills. The problem then becomes one of preventing the pollution of our ground and surface waters by the leachate.

Water pollution from sanitary landfills is determined by a number of factors, including the site hydrology, geology, topography, method of operation, the type of wastes received for disposal, and other physical and chemical factors which vary from fill to fill. Clearly, then, the potential for polluting our ground and surface water resources should be a strong factor in the selection of a sanitary landfill site, and in its design and method of operation.

The proposed regulations include more detailed requirements for the preparation of sanitary landfill designs than did Chapter VIII of the New Jersey State Sanitary Code (see 7:26-2.12). The information supplied in those designs should be sufficient for the Department of Environmental Protection to assess the potential of a proposed sanitary landfill to pollute the ground or surface waters. The Solid Waste Management Act (1970), in describing the conditions under which the Department registers solid waste operations (N. J. S. A. 13:1E-5) states:

> "No registration shall be approved by the Department when in the opinion of the Department such solid waste collection or disposal system or operation will not meet the standards or criteria set forth in regulations as may be promulgated under authority of this Act."

In addition, the proposed regulations permit the Department of Environmental Protection to require the installation of observation wells at sanitary landfills to monitor the groundwater quality, and the regulations further require the correction of water-polluting conditions when that monitoring discloses contamination (7:26-2.5.4 and 7:26-2.5.22).

Gas Control.

Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called "aerobic." The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present in methane. Methane is the "natural gas" commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is no oxygen present, it does not pose an explosive threat in the fill itself.

Methane is, however, much lighter than air and, therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

The proposed regulations require gas control measures at all sanitary landfills (see 7:26-2.5.21) and the design of gas vents has been added to the sanitary landfill design requirements (7:26-2.12.2).

Hazardous Wastes.

New Jersey leads the nation in chemical industries. While chemical and hazardous wastes represent only a small percentage of all the wastes disposed of in New Jersey, improper handling of those wastes can present enormous health and environmental dangers. Regulations contained within the existing Chapter VIII of the N. J. State Sanitary Code merely require the proper labeling and transportation of hazardous and chemical wastes in accordance with existing State and Federal laws governing their transportation.

The proposed Rules governing the disposal of pesticides, hazardous, chemical, and infectious wastes, as well as bulk liquids and semi-liquids (7:26-2.6.4) require both the waste generator and the disposal facility operator to provide to the Bureau of Solid Waste Management complete information on the wastes handled. Determining the proper method of treatment or disposal would be a joint responsibility of the generator, facility operator, and the Bureau.

The introduction of bulk liquids into a landfill can greatly affect the generation of leachate within the fill, and leaching from fills which have accepted hazardous wastes can have a particularly devastating effect on the quality of our water resources. For these reasons, the proposed regulations would require any sanitary landfill which accepts such wastes to establish and maintain water monitoring facilities, and to undertake immediate corrective measures should the monitoring disclose contamination.

Additionally, the proposed regulations would band the disposal of hazardous wastes and bulk liquids at conventional sanitary landfills after March 15, 1975. This, it is felt, is sufficient lead-time for the construction of recovery, treatment and disposal facilities with sufficient safeguards to properly handle hazardous and bulk-liquid wastes.

Airport Restriction Zones

The Federal Aviation Administration, along with numerous state and other federal agencies, has become increasingly concerned with the attraction of birds to sanitary landfills located near airports. The ingestion of birds by jet aircraft can be especially dangerous, and several such incidents have been attributed to the proximity of solid waste disposal operations to airports. For this reason, the proposed facilities within a 2½ mile "restricted zone" of certain airports in or near New Jersey. In addition, existing disposal facilities within the restricted zone would be required to implement effective bird-control measures. A radius of 2½ miles is sufficient for most jet aircraft to achieve an altitude safe from birds attracted to landfills.

III. *Definitions*

Problems encountered in the application and enforcement of Chapter VIII have made it clear that a uniform set of definitions is needed. The proposed regulations include a list of 77 definitions of terms used throughout those regulations.

IV. *Out-of-State Waste*

In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this

State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously

high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

Solid Waste Planning

In enacting the Solid Waste Management Act (1970), the legislature declared ". . . that the current solid waste crisis should be resolved not only by the enforcement of more stringent and realistic regulations upon the solid waste industry, but also through the development and formulation of State-wide, regional, county, and intercounty plans for solid waste management and guidelines to implement the plans." In fact, that statute, in requiring the registration of solid waste collection and disposal operations, requires the Department of Environmental Protection to give "due consideration" to the development

of existing or "reasonably contemplated" regional operations. The proposed regulations provide a registration priority for new collection and disposal operations which conform to existing regional plans for solid waste management (N. J. A. C. 7:26-2.2.3 and -3.2.3).

The Department of Environmental Protection published the *New Jersey State Solid Waste Management Plan* in 1970. That plan, like the Solid Waste Management Act (1970), stresses the need for regionalization in solid waste collection and disposal. The publication of the state plan did not, however, represent the end of solid waste planning in New Jersey. The Department, as well as a number of counties and regional authorities, have been continually and actively involved in solid waste planning. The planning process, however, requires accurate and up-to-date uniform data on existing solid waste generation, transportation and disposal. In order to facilitate the Department's planning activities as well as to enable the Department to provide acceptable data for use by regional planning agencies, the proposed regulations require solid waste operations to keep records of the wastes handled and to make reports of those records to the Department (7:26-2.5.26, -2.6.4.1, and -3.10). In addition, solid waste disposal facilities would be required to periodically update the engineering designs submitted to the Department (7:26-2.2.1) and major solid waste collection systems would be required to submit collection system designs describing their operations (7:26-3.4 and 3.11).

Additionally, the proposed regulations would require the solid waste contents of collection vehicles to be determined by weight, either through the provision of scales at the disposal facility or through the use of public scales. Currently, the most common system of record keeping and

filling on the part of solid waste disposal operations is based upon the volumetric capacity of the vehicles being admitted for unloading. These records require solid waste planners to estimate waste densities (a highly variable parameter) and ignore the question of whether or not the vehicles are actually filled to capacity when they arrive at the disposal facility.

The provision of scales at solid waste facilities produces other benefits in addition to providing uniform planning data. Billing by weight, instead of by vehicle capacity, is a more equitable practice, and would assist the New Jersey Board of Public Utilities Commissioners in establishing rates. Furthermore, communities which engage in segregation and recycling activities, and collectors who provide resource recovery service, are more likely to derive a savings in their disposal costs if those costs are based on weight rather than the size of the collection vehicle.

Incinerators, Transfer Stations, and other Solid Waste Facilities.

The Bureau of Solid Waste Management does not currently administer standards or regulations governing solid waste facilities other than sanitary landfills. The proposed regulations include operational requirements and design standards for incinerators, transfer stations, processing facilities, reclamation centers and recycling facilities (7:26-2.11 and -2.12). The regulations proposed for those facilities are consistent with the minimum requirements for sanitary landfills. Controls over litter, dust, fire and vectors are similar to those governing landfills and are already contained within Chapter VIII of the New Jersey State Sanitary Code. In addition, requirements for the storage of putrescible materials, the handling of hazardous

wastes, odor control, the weighing of solid wastes and the maintenance of records are consistent with those proposed for landfill operations.

As is already the practice with sanitary landfills, the requirement for an engineering design for these facilities is intended to provide information to the Department of Environmental Protection to determine whether the proposed facility will meet Departmental standards. The Department is required to deny registration to any facility which, in its opinion, will not meet the standards or criteria set forth in its solid waste regulations.

Collection and Haulage.

While the Solid Waste Management Act (1970) empowered the Department of Environmental Protection to promulgate regulations governing the collection as well as the disposal of solid wastes, the Bureau of Solid Waste Management does not yet administer such regulations. The proposed regulations include a subchapter establishing standards for collection and/or haulage operations which are presented in a format similar to the regulations governing disposal facilities.

The proposed regulations establish the specific standards and procedures for the registration of collection operations. The registration of collection systems is a requirement of the Solid Waste Management Act (1970). The haulage of family refuse in family passenger automobiles would be exempt from the requirements of the collection subchapter.

Collection systems operated by governmental agencies, as well as those whose service is performed under contract to government or is authorized by a franchise, would be required to submit a collection system design to the Bureau of Solid Waste Management for review

(7:26-3.4 and -3.11). The system design would detail the routes, service stops, personnel and equipment involved in the collection operation, and would aid the Department in determining the ability of a proposed operation to meet operating standards. The collection system design would provide valuable information for use in state and regional solid waste planning.

The proposed operating standards for collection and haulage operations are already widely practiced by both municipal and private collection operations. Failure to provide proper collection services can result in unhealthy and unsanitary conditions at the place where solid waste is generated or stored. For this reason, the proposed regulations would require service routes to be of reasonable length, and would require the proper maintenance of collection vehicles to ensure timely collection services. In addition, the regulations require specific measures to be taken to minimize spillage or littering associated with the collection or haulage of wastes.

Fees.

In 1971 the Solid Waste Management Act (1970) was amended (Chapter 461, P. L. 1971) to permit the Department of Environmental Protection to adopt a fee schedule and to charge fees for any of the services it performs. The proposed regulations include a schedule of fees for registration of solid waste operations and for the review of engineering and collection system designs. The fee schedule is commensurate with the cost of the service performed by the Department.

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AFFIDAVIT OF RICHARD A. PELUSO AND DENNIS G. FENN.

(January 31, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO and DENNIS G. FENN, being duly sworn upon their oaths, according to law, depose and say:

1. I, Richard A. Peluso, am a professional engineer licensed to practice in the State of New Jersey.

I, Dennis G. Fenn, am a civil engineer practicing in the State of New Jersey.

2. I, Richard A. Peluso, hold a master's degree in Environmental Engineering and have completed almost all course work toward a doctor's degree in said field, and have had in excess of five years experience in the field of solid waste management.

I, Dennis G. Fenn, hold a master's degree in Environmental Engineering and have over three years experience in the field of solid waste management.

3. In the event plaintiffs are required to remove solid waste previously disposed of in a sanitary landfill facility it would be necessary to open a face in the landfill, which would seriously increase the potential danger to both the health of the residents of the State of New Jersey and the quality of the environment of said State.

4. The principal hazards precipitated by such removal includes a proliferation of leachate, vermin and rats, and the creation of serious odor problems.

5. There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection.

6. A typical sanitary landfill consisting of 200 acres, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 15 years.

RICHARD A. PELUSO
Richard A. Peluso
DENNIS G. FENN
Dennis G. Fenn

Sworn to and Subscribed before me this 31st day of January, 1974.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires (illegible)

Filed February 5, 1974

JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
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SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
Docket No. L-15068-73 P. W.

CIVIL ACTION
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Herbert F. Moore, Esq., attorneys for plaintiffs, and in the presence of Joseph M. Clayton, Jr., Deputy Attorney General of the State of New Jersey, attorney for defendants, and the Court having considered the complaint and affidavits attached thereto and the answer filed on behalf of the defendants, and having heard the arguments of the respective counsel, and being satisfied that the plaintiffs are entitled to an order restraining defendants as demanded.

And it appearing that the Order to Show Cause made on the 25th day of January, 1974 has been duly served as therein directed,

It is on this 1st day of Febr., 1974,

ORDERED, that the State of New Jersey shall desist and refrain from enforcing the provisions of P. L. 1973, c. 363;

IT IS FURTHER ORDERED, that Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from enforcing N. J. A. C. 7:1-4;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from adopting any rule or administrative order, of any nature or descripiton, which would prohibit the treatment or disposal in New Jersey of solid waste collected or originating in another state, or which would prohibit transportation of such waste into this state for disposal purposes;

IT IS FURTHER ORDERED, that the restraints contained herein shall apply to the aforesaid defendants and their agents, employees, servants and attorneys until the further order of this Court.

/s/ GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

By: Joseph M. Clayton, Jr.
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc. et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ANSWER

Defendants, by way of answer to the complaint in the above captioned matter, say:

COUNT 1.

1. The allegations contained in Paragraphs 1 through 6 of the First Count of the Complaint are admitted.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the First Count of the Complaint.

3. The Solid Waste Management Act referred to in Paragraph 8 of the First Count of the Complaint speaks for itself.

4. The allegations contained in Paragraph 9 of the First Count of the Complaint are admitted.

5. With respect to the allegations contained in Paragraphs 10 and 11 of the First Count of the Complaint, the Waste Control Act (L. 1973, c. 39) speaks for itself.

6. Defendants admit the allegations contained in Paragraphs 12, 13 and 14 of the First Count of the Complaint; however, said regulations (N. J. A. C. 7:26-1.8.1 and 1.8.2) have been superseded by L. 1973, c. 363, and said regulations will not be adopted by the Department.

7. The Solid Waste Utility Control Act referred to in Paragraph 15 of the First Count of the Complaint speaks for itself.

8. The allegations contained in Paragraph 16 of the First Count of the Complaint are denied.

9. The allegations contained in Paragraph 17 of the First Count of the Complaint are admitted.

10. The allegations contained in Paragraph 18 of the First Count of the Complaint are denied.

11. The allegations contained in Paragraph 19 of the First Count of the Complaint are denied.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the First Count of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the First Count of the Complaint.

14. The allegations contained in Paragraph 22 of the First Count of the Complaint are denied.

COUNT 2.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Second Count of the Complaint are denied.

COUNT 3.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Third Count of the Complaint are denied.

COUNT 4.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourth Count of the Complaint are denied.

COUNT 5.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifth Count of the Complaint ar denied.

COUNT 6.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixth Count of the Complaint are denied.

COUNT 7.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventh Count of the Complaint are denied.

COUNT 8.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraphs 2 through 12 of the Eighth Count of the Complaint are admitted, except that the various laws of the State of New Jersey referred to in said allegations speak for themselves.

3. Defendants admit that the preservation of additional landfill acres for solid waste generated in New Jersey was one of the reasons for the enactment of a ban on the disposal in New Jersey of waste originating outside the State.

4. The allegations contained in Paragraph 14 of the Eighth Count of the Complaint are admitted.

5. The allegations contained in Paragraph 15 of the Eighth Count of the Complaint are denied.

6. The laws of the United States, specifically 42 U. S. C. § 3254, speak for themselves.

7. The allegations contained in Paragraph 17 of the Eighth Count of the Complaint are denied.

8. The allegations contained in Paragraph 18 of the Eighth Count of the Complaint are denied.

9. Defendants repeat their answers to the allegations contained in Paragraphs 20 through 22 of the First Count of the Complaint and incorporate same herein by reference.

COUNT 9.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Ninth Count of the Complaint are denied.

COUNT 10.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Tenth Count of the Complaint are denied.

COUNT 11.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eleventh Count of the Complaint are denied.

COUNT 12.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Twelfth Count of the Complaint are denied.

COUNT 13.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Thirteenth Count of the Complaint are denied.

COUNT 14.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourteenth Count of the Complaint are denied.

COUNT 15.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifteenth Count of the Complaint are denied.

COUNT 16.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixteenth Count of the Complaint are denied.

COUNT 17.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventeenth Count of the Complant are denied.

COUNT 18.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eighteenth Count of the Complaint are denied.

COUNT 19.

1. N. J. S. A. 13:1I-4(a) speaks for itself.

2. The allegations contained in Paragraph 2 of the Nineteenth Count of the Complaint are denied.

FIRST SEPARATE DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE.

To the extent that the complaint constitutes a challenge to the administrative regulations adopted by the Department of Environmental Protection, the Superior Court, Law Division, lacks jurisdiction over the subject matter thereof.

THIRD SEPARATE DEFENSE.

The enactment of L. 1973, c. 363 has superseded the proposed regulations referred to in the complaint as

N. J. A. C. 7:26-1.8.1 and 1.8.2. The Department has indicated its intent to not adopt those proposed regulations. Thus the allegations with respect to those regulations are moot.

FOURTH SEPARATE DEFENSE.

Plaintiffs have failed to exhaust their administrative remedies.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

I hereby certify that the within pleading has been served within the time prescribed by Rule 4:6.

JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

PEREIRA DEPOSITION.
(March 13, 1974.)

[64]

particular site Joe Miller has all the ground water data and he is in the ground water section.

When it comes to a ground water, the formation, the location and so on and so forth, they turn to me.

Then, of course, Dr. Kemball Widmer, who is our Chief, as in all offices where the brass is concerned, he would have the ultimate say.

Mr. Meisel: That is all I have.

• • •

LINO F. PEREIRA, sworn.

DIRECT EXAMINATION.

By Mr. Meisel:

Q. Mr. Pereira, I am going to ask you a series of questions.

The purpose of the questions is to in no way trick you but simply to elicit answers to the questions that are asked.

If you do not understand a question at any time or if the question needs to be rephrased for you to understand it, please ask me and I will do so.

A. Right.

Q. Could you please state your place of employment.

A. I work for the New Jersey Department of Environmental Protection, the Bureau of Solid Waste Management

[65]

in the Division of Environmental Quality.

Q. What is your position in that Bureau?

A. I am principal environmental engineer with that Bureau.

Q. How long have you served in that capacity?

A. For approximately 10 months.

Q. Were you employed by the State of New Jersey prior to that time?

A. Yes. I have been employed by the State and specifically the Bureau of Solid Waste Management since early June of 1970.

Q. In what capacity were you employed prior to being employed as principal engineer?

A. For the first year of my employment I was employed with the title of Chemical Engineer Trainee.

For the subsequent year I was employed as an Assistant Environmental Engineer.

For approximately 11 months thereafter I was employed as a senior environmental engineer and since that time I have held the title of Principal Environmental Engineer.

Q. Were you employed for any other concern prior to coming with the State?

A. Not on a full-time basis, that is, not other than summer work and part-time work while I was in college.

Q. When did you graduate from college?

[66]

A. In 1970.

Q. With what degree?

A. Bachelor of Science in Chemical Engineering.

Q. Do you hold any license issued by the State of New Jersey?

A. Not any license, not as a licensed professional engineer although I am registered with the Board of Professional Engineers under Title 45 as an engineer in training, which is a prerequisite for obtaining a license as a professional engineer.

Q. I notice that you have obtained a BS in Chemical Engineering.

Did you have any specific course work concerning sanitary engineering?

A. None specifically concerning sanitary engineering although a number of the courses one is required to take for chemical engineering are also required by sanitary engineering.

Q. Are you familiar with Public Law 1973 Chapter 363 passed by the State of New Jersey, being an act to prohibit any person from bringing into this state any solid and liquid waste which originated or was collected outside the state and supplementing the Waste Control Act approved February 21, 1973?

A. Yes, I am.

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[87]

department are based largely upon the state of the art at this time and not upon the threat or not necessarily upon the threat to the health, safety and welfare.

Q. I would request that the last question that I asked be answered with a Yes or No because your response did not answer that question.

Mr. Meisel: Read it back, please.

(The reporter read the pending question.)

Mr. First: If you can answer that Yes or No, go ahead.

A. It is a rather difficult question to answer.

Q. The standards either are or are not adequate. It seems to me that it can be answered Yes or No.

A. My answer would be as they are now promulgated they are not adequate, in my opinion.

Q. Are the standards as proposed in the proposed rules of the Bureau of Solid Waste Management adequate

to protect the public health safety and welfare or the quality of the environment?

A. Only insofar as those standards are met by the operation.

Q. All right. So if they are met is your answer Yes?

A. My answer is Yes but it is qualified to the extent that sometimes it is not feasible or possible to men-

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[99]

know about.

Q. How does the Department of Environmental Protection compute the life expectancy of a particular landfill site?

A. The only method or the method that the department has used and does use in computing the life expectancy of a sanitary landfill site utilizes the information submitted with the engineering design, that information being the life expectancy of the site as calculated by the design engineer and the tonnage received at the site per week.

The calculation by the department assumes that the tonnage will remain constant and that the engineer calculated his life expectancy on that constant tonnage and the calculation involves taking the tons per week—well, I can probably stop here and say that for any particular site the life expectancy is given to us in the engineering design by the licensed professional engineer who provided it and it is assumed that he does so based on current tonnages or expected tonnages at the site.

Q. Let us suppose that it is a 200-acre site, that the site is uniform throughout and as a result there are no special problems, the entire site is useful, that 10,000 tons per week is brought to that site, that the site will be built

up by 50 feet, that one is using the usual six inches of daily cover and 2 feet of final cover, what would

[100]

the anticipated life expectancy of that site be, utilizing the best compaction methods available in the state of the art?

A. We are speaking about a 200-acre site by 50 feet in depth, uniformly 50 feet across the entire thing?

Q. That is correct.

A. And you were asking for the maximum amount of solid waste that can be placed therein?

Q. I am asking for the anticipated life expectancy of the site.

A. Could you give me the rate at which tonnage is brought in again?

Q. 10,000 tons per week.

A. Are we pre-supposing here that the operator utilizes the space to the maximum by under existing standards creating each lift as high as is permitted under existing standards?

Q. Yes, we are.

A. Are you asking me to calculate it or do you want to know how we would calculate it?

Q. I am asking you to calculate it.

A. My calculations bring this to over 12 years or 12.4 years in fact, assuming that one-fifth of the volume is consumed by soil cover.

Q. What is the expected or anticipated life

[101]

expectancy of landfills presently existing in the State of New Jersey?

A. That is very difficult to calculate because of a number of factors.

Our best estimate is that the existing landfills in the state have no more than 10 years of life.

Q. Would the life expectancy of existing landfills be increased by using a variety of processing alternatives to reduce weight and/or volume of solid waste?

A. Yes, I believe so.

Q. Has there been any estimate as to how long that life expectancy would be extended by using such processing alternatives?

A. No, there hasn't been any estimate to my knowledge.

Q. Has there been any estimate as to the availability of additional acreage in the State of New Jersey for sanitary landfill purposes?

A. No estimate has been made but noting the establishment of new sanitary landfills, the rate of that establishment is low compared to the frequency with which landfills cease to exist in this state.

Q. Can new sanitary landfills be established in the State of New Jersey?

A. Yes, I believe they can be established.

[102]

Q. You indicated earlier that certain kinds of land may be more suitable other than kinds of land for sanitary landfill purposes.

A. That's correct.

Q. Is there any estimate as to the number of acres of the most suitable land for sanitary landfill purposes which presently exists in the State of New Jersey?

A. I find that a very difficult question to answer because, first, it speaks to the relative suitability of one piece of land over another piece of land for the use of sanitary landfill.

If one defines one's standards stringently enough, I suppose it is possible to end up with very little square feet of land that is entirely suitable.

Q. Under existing standards in the State of New Jersey which could not be used for sanitary landfill purposes?

A. Yes.

Q. What kind of land could not be used?

A. Lands which are, for instance, protected in their natural state as are flood plains, wetlands, various tidal lands existent in the state as well as, of course, other restrictions such as local land use requirements so far as they apply to sanitary landfill sites.

[103]

Q. I am not speaking to whatever local land use requirements there might be.

A. You are speaking only of environmental considerations?

Q. Approximately how many acres would you calculate there are involved in the kinds of land you suggested would be absolutely unsuitable or unusable for sanitary landfill purposes?

A. I don't know.

Q. Does it represent a substantial portion of the land of the State of New Jersey in terms of the total land area of the state or does it represent an insubstantial total land area taken the total land area of the state?

A. Again I don't know because I don't deal specifically with those lands.

I can only answer that in my experience with the review of designs and the approval of existing facilities in the state that a substantial portion of the existing facilities, sanitary landfills in the state does now or did consist of those lands.

Q. Who is responsibile for working in those areas?

A. The Wetlands Act is administered specifically by the Wetlands Section in the Division of Marine Services in the Department of Environmental Protection.

The flood plain reqirements are administered speci-

• • •

[112]

Q. Is it the volume of solid waste which causes a threat?

A. Yes, in terms of its tonnage, the actual quantity of waste, the degree of threat is directly proportionate to the tonnage of waste disposed.

Q. If there was less tonnage would the threat or could the threat be diminished to a point where it would not pose a substantial or material threat?

A. I suppose it could but I could not possibly put my finger on the tonnage that would not pose a substantial or material threat.

It may only be one ton. I don't know.

Q. Can New Jersey dispose of all or a portion of its solid waste outside the State of New Jersey?

A. Can it do so?

Q. Yes.

Mr. First: You mean can the people of the state?

Mr. Meisel: Yes.

A. As far as I know under existing legislation it can be done. It is possible.

Q. Are there instances in which communities in New Jersey dispose of all or a portion of the solid or liquid waste originating in those municipalities outside of the State of New Jersey?

[113]

A. There have been instances in the past and even in the recent past, if one considers 1971 the recent past. I am not familiar with the communities or the quantities after 1971.

Q. Does the City of Phillipsburg dispose of substantially all its solid waste outside the State of New Jersey?

A. It did in the calendar year 1971 as far as I know.

Q. Are there sanitary landfill facilities outside of the State of New Jersey which accept solid waste which originates inside of the State of New Jersey?

A. I don't know if there are sanitary landfill facilities.

Our records merely indicate that in the Calendar year 1971 some wastes were exported from the state to disposal sites outside the state.

Q. Has the Department of Environmental Protection explored the question as to whether a greater percentage than now exists of solid waste originating in New Jersey can be disposed of outside the State of New Jersey?

A. You mean by that have we contemplated sending more out?

Q. No. I am asking if you have looked into alternatives, whether there are facilities to which you could

[114]

send solid waste originating in New Jersey which exist outside the State of New Jersey.

A. I can think of no effort on our part to look into that at all.

Our planning for Solid Waste Management has assumed that New Jersey will bear the responsibility for its own wastes.

The planning has gone on accordingly.

Mr. Meisel: I think we can break for the day.

• • •

Filed March 21, 1974

JAMIESON, WALSH, McCARDELL, MOORE
AND PESKIN,
a Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al
Defendants

NOTICE OF MOTION

TO: WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

SIR:

Please take notice that the undersigned, attorneys for plaintiffs, will apply to the Superior Court of New Jersey,

Mercer County Court House, Trenton, New Jersey on Friday, March 22, 1974 at 9:00 A. M. or as soon thereafter as counsel may be heard, for summary judgment in favor of plaintiffs only upon the issues of federal preemption and discrimination against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution; and plaintiffs will make further application for an order to set the date of hearing on the merits of the matter, if such hearing is necessary, on Monday, April 15, 1974, or upon such other day as may be ordered by the court and not on Monday, March 25, 1974 as presently scheduled.

On or before Monday, March 18, 1974, there will be served upon defendants the documents upon which plaintiffs will rely at the hearing on this motion.

JAMIESON, WALSH, McCARDELL, MOORE
and PESKIN
A Professional Corporation
by: ARTHUR MEISEL
Arthur Meisel

Dated: March 14, 1974

EXCERPTS FROM BRIEF OF APPELLANTS, STATE OF NEW JERSEY, FILED IN THE APPELLATE DIVISION.

(Pages 17-18.)

[17]

• • •

Similarly, the State of New Jersey does not recognize solid waste for disposal as a legitimate item of commerce. As did Indiana with dead horses, New Jersey only allows solid waste to be handled by those who are licensed and regulated under the concurrent jurisdiction of the Public Utilities Commission and the Department of Environmental Protection. N. J. S. A. 48:2-13; N. J. S. A. 48:13A-1, et seq.; N. J. S. A. 13:1E-1, et seq. The license and regulatory scheme is broad and pervasive and is designed to insure that the public health and environment are properly protected against this deleterious

[18]

substance. Surely, the above statutes clearly demonstrate that the State of New Jersey has not recognized waste as a legitimate item of commerce. Thus, P. L. 1973, C. 363 is consistent with, and not repugnant to, the rationale of the "natural gas" cases.

• • •

EXCERPTS FROM BRIEF SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

(Pages 1 and 2.)

INTRODUCTORY STATEMENT.

The Constitution of the United States provides that Congress shall have the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." *U. S. Const.* Art 1, Sec. 8, cl. 3.

There are four separate and distinct commerce clause issues presented by the within litigation:

1. Whether Congress has expressly or impliedly pre-empted the right of a state, in the exercise of its police power, from prohibiting a person from bringing into a state any solid or liquid waste which originated or was collected outside the territorial limits of the state;

2. Whether a state, in the exercise of its police power, can discriminate against interstate commerce;

3. Whether and to what extent a state, in the exercise of its police power, can burden interstate commerce; and,

4. Whether reasonable and undiscriminatory alternatives, adequate to conserve local interests, are available.

Issues numbered (1) and (2) are purely legal in nature and are ripe to be decided by the court on a motion for summary judgment. Issues numbered (3) and (4) require factual testimony, and therefore are not made part of the motion for summary judgment or discussed in this brief.

EXCERPTS FROM BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

(Pages 1, 17-18.)

[1]

PROCEDURAL STATEMENT.

This brief is submitted in support of defendants' motion for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment. The cross-motions for summary judgment are directed to two issues: (1) whether the power of the State of New Jersey to enact P. L. 1973, c. 363 has been pre-empted, and (2) if not, whether P. L. 1973, c. 363 discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution.

• • •

[17]

It is thus evident that the court must consider *"all the relevant facts and circumstances."* At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.* The Supreme Court has stressed that:

> ". . . *state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.* Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 U. S. 8, 87 L. ed. 578, 63 S. Ct. 420); Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594.

• • •

> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and *whether the relative weights of the state and national interests involved are such as to make inapplicable the rule. . .*" *Southern Pacific Co. v. Arizona,* 325 U. S. 761, 770, 89 L. Ed. 1915, 1925, 65 S. Ct. 1515 (1944) (emphasis added).

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes [18] in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the affect on interstate commerce.

• • •

CONSENT ORDER.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc., et al.
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

This matter having been opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, attorneys for plaintiffs, for an order permitting plaintiffs to set down a hearing date for a notice of motion upon short notice; and it appearing to the Court that trial in the within matter is presently scheduled for March 25, 1974;

And it further appearing that the within matter may be disposed of in whole or in part by motions for summary judgment;

And it further appearing that it would be materially inconvenient to conduct a trial on the within matter on March 25, 1974;

And it further appearing that William F. Hyland, Esquire, by Mark L. First, Esquire, Deputy Attorney General, attorney for defendants, has consented to the entry of the within order;

And good cause appearing,

It is on this 15th day of March, 1974,

ORDERED, that the plaintiffs' notice of motion for summary judgment and defendants' cross-motion for summary judgment be and the same hereby is set down for a hearing before this court on Friday, March 22, 1974 at 1:30 P.M. or such later time as counsel may be heard; and it is further

ORDERED, that plaintiffs serve a brief and such other documents upon which they will rely in connection with said motion, upon defendants and upon the court on or before Monday, March 18, 1974; and it is further

ORDERED, that defendants serve upon plaintiffs and upon the court, such brief and other documents upon which they will rely in connection with said motion, on or before the forenoon of Thursday, March 21, 1974; and it is further

ORDERED, that the trial on the merits of the within matter is rescheduled for Monday, April 15, 1974.

GEORGE Y. SCHOEN
George Y. Schoen, A. J. S. C.

I hereby consent to the entry and form of the within order.

MARK L. FIRST
Mark L. First
Deputy Attorney General
Attorney for Defendants

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION

Docket No. L-15068-73 P. W.
Civil Action
CITY OF PHILADELPHIA, etc., et al.
Plaintiffs,

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, attorneys for plaintiffs, by Herbert F. Moore, Esq., on a Notice of Motion for Summary Judgment pursuant to R. 4:46 of the Rules governing this Court, in the presence of the office of the Attorney General of the State of New Jersey, attorney for defendants, Mark L. First, Esq., appearing;

And the Court having heard the argument of the attorneys for the respective parties and being of the opinion that the pleadings, together with the affidavits and briefs submitted in support of and in opposition to plaintiffs' motion show palpably that there is no genuine issue as to any material fact challenged and that the plaintiffs have a right to summary judgment declaring P. L. 1973, c. 363 invalid as constituting an unconstitutional discrimination on interstate commerce;

It is on this 26th day of March, 1974,

ORDERED, and declared that P. L. 1973, c. 363 constitutes an unconstitutional discrimination against interstate commerce and is invalid in its entirety.

GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

Consent as to form of the within judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

WILLIAM F. HYLAND
Attorney General Of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY

DOCKET No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

NOTICE OF APPEAL

To: CLERK OF THE COURT
HONORABLE GEORGE Y. SCHOCH
Judge, Superior Court of New Jersey
Mercer County Court House
Trenton, New Jersey 08607

HERBERT F. MOORE, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
One West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Interstate 287 and McKinley Street
South Plainfield, New Jersey 07080

SIRS:

NOTICE IS HEREBY GIVEN that all defendants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey, appeal to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring P. L. 1973, c. 363 unconstitutional as violative of Article I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Mark L. First
Deputy Attorney General

DATED: April 19, 1974

I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET No. A-2202-73

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

MOTION FOR STAY PENDING APPEAL.

To: CLERK OF THE COURTS

ARTHUR MEISEL, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
Attorney for Plaintiffs-Appellants
1 West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Attorney for Plaintiffs-Intervenors-Appellants
Interstate 287 and McKinley Street
South Plainfield, New Jersey

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants-appellants, hereby moves the Superior Court of New Jersey, Appellate Division, for an order staying the judgment entered by the Superior Court of New Jersey, Law Division, Mercer County (Schoch A. J. S. C.) on March 27, 1974.

In support of the within motion, the defendants-appellants will rely on the brief and affidavits submitted herewith and the brief and appendix submitted on July 9, 1974.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Deputy Attorney General

DATED: July 26, 1974

AFFIDAVIT OF DAVID J. DAMIANO.
(May 7, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc., et al.
Plaintiffs,

v.

STATE OF NEW JERSEY, etc., et al.
Defendants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath says:

1. I am the Commissioner of the Department of Streets of the City of Philadelphia, one of the above-named plaintiffs.

2. That as Commissioner I have the responsibility for the Sanitation of the City and the disposal of its solid waste material.

3. I have personal knowledge of the matters hereinafter referred to and make this affidavit in opposition to a notion made by the Defendants to stop the Judgment of this Court in the within matter.

4. I have previously given my affidavit on January 16, 1974 in which affidavit set forth facts that if P. L. 1973, c. 363 were enforced, the City of Philadelphia would suffer great, immediate and irreparable damage, in that the City of Philadelphia does not have other alternative facilities available for the disposal of the solid waste originating within its municipal confines, other than incinerators, the operation of which would violate existing Federal Air

Pollution Standards, and is dependent upon the utilization of those facilities located within the State of New Jersey at the present time.

5. That since the date of the last affidavit there has been virtually no change in the City's dependence upon the New Jersey facilities for disposal of its solid waste material other than placing out for bid a survey project for the disposal of solid waste material in a strip mining site in the Western portion of the State of Pennsylvania. This survey would be an initial step to determine the feasibility of the disposal of processed solid waste material at a point substantially distant from the City of Philadelphia utilizing railroad transportation. If the survey is successful, the program would require a period of time not less than six (6) years to make a site ready in compliance with existing Federal and State environmental laws.

6. If the motion for Stay of Judgment is granted and restraints are not continued in the Court, pending appeal, the City of Philadelphia will suffer great damage, in that solid waste will accumulate within the said City and would become a serious hazard to the health, safety, and welfare of the people thereof and eventually to the people within the Delaware Valley area which consists of areas within the Commonwealth of Pennsylvania, the State of New Jersey and the State of Delaware. This problem presents an immediate hazard at all times, and is particularly compelling during the heat of the summer months.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 7 day of May, 1974.

JANET ALTHOUSE
Janet Althouse
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires February 5, 1977.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2202-73
Motion No. M-1978-73
Before Part P

Judges: HANDLER, MEANOR, CRANE

CITY OF PHILADELPHIA, etc., et als

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als

v.

STATE OF NEW JERSEY, et al.

Moving Papers Filed:	July 26, 1974
Answering Papers Filed:	August 8 & 9, 1974
Date Submitted to Court:	August 12, 1974
Date Argued:	
Date Decided:	August 14, 1974

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

	GRANTED	DENIED	OTHER
MOTION FOR STAY		X	X

SUPPLEMENTAL:

The appeal shall be accelerated.

FOR THE COURT:

ALAN B. HANDLER
P. J. A. D.

I hereby certify that the forgoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

WITNESS, THE HONORABLE ALAN B. HANDLER, PRESIDING JUDGE OF PART P, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, this 14th day of August, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

SUPREME COURT OF NEW JERSEY
#10927 September Term 1974

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents
and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause on March 25, 1974 in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-2202-73), be certified directly to this Court for review by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers to be filed by the parties in the prosecution of this appeal shall be filed by the Clerk of this Court without payment of fees for such filing; and it is further

ORDERED that this matter be consolidated with Hackensack Meadowlands Development Commission and State

of New Jersey v. Municipal Sanitary Landfill Authority, et al and City of Yonkers, New York (A-1592-73).

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton on this 7th day of October, 1974.

FLORENCE R. PESKOE
Clerk

AFFIDAVIT OF DAVID J. DAMIANO.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

DAVID J. DAMIANO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am Commissioner of the Department of Streets of the City of Philadelphia, Pennsylvania, one of the above-named plaintiffs.

2. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of an

application to the New Jersey Supreme Court on an emergent basis, for temporary stay of judgment and continuation of the injunctive order heretofore entered in connection with the above captioned matter.

3. I have prepared affidavits dated, respectively, January 16, 1974 and May 7, 1974 with respect to the above captioned litigation, and said affidavits have been filed with the Court. There is no substantial or material change in any of the information contained in said affidavits, [except that the City of Philadelphia has entered into an agreement with an additional New Jersey landfill company (Burlington Environmental Management, Inc.)], and the information contained in same is incorporated by reference herein as if fully set forth.

4. In the event injunctive relief is not immediately given, city collected solid wastes would accumulate on the streets of Philadelphia in excess of 2,000 tons daily creating a health crises in less than two weeks.

DAVID J. DAMIANO
David J. Damiano

Sworn to and Subscribed before me this 18th day of November, 1975.

RICHARD A. RAGSDALE
Richard A. Ragsdale,
Attorney-at-Law of New Jersey

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill and Development operates a sanitary landfill in Burlington County, N. J. and is so certified by the

Public Utility Commission and Department of Environmental Protection.

3. Approximately 75% of the volume of refuse disposed of at this site comes from the City of Philadelphia.

4. This landfill also serves several New Jersey communities as well as private haulers in New Jersey who serve industry and commerce located in this state.

5. The operation of this landfill in compliance with the Department of Environmental Protection regulations requires a large dollar volume of business. Without the benefit of the Philadelphia contract this sanitary landfill operation will not be economically feasible.

6. It is likely that Landfill and Development Company will be unable, for financial reasons, to continue operating a sanitary landfill facility in the event it loses the volume of solid waste generated by the City of Philadelphia.

LEO F. HUGHES, 3rd
Leo F. Hughes, 3rd

Sworn to and Subscribed before me this 18th day of November, 1975.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires March 16, 1977

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

ORDER GRANTING STAY AND CONTINUING INJUNCTIVE RELIEF.

This matter being opened to the court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs-respondents, Herbert F. Moore, Esq. appearing in the presence of Assistant Attorney General Stephen L. Skillman, attorney for defendants-appellants for an order temporarily staying the judgment of the Supreme Court of New Jersey in the above captioned matter and temporarily continuing the injunctive order heretofore entered by the Superior Court of New Jersey, Law Division, in connection therewith, and good cause being shown,

It is on this 20th day of November, 1975,

ORDERED, that the judgment of this court heretofore entered in this action on November 18, 1975 against plaintiffs-respondents be and hereby is temporarily stayed and that the injunctive order heretofore issued in connection with this case is hereby temporarily extended until further order of the court; and it is

FURTHER ORDERED, that plaintiffs-respondents shall file a memorandum with this court, and serve same upon the parties to this proceeding, not later than Wednesday, Nov. 26, 1975, demanding such relief as they deem appropriate including argument in support thereof, and defendants-appellants shall thereafter have a period of 10 days within which to file and serve a responsive memorandum thereto.

RICHARD J. HUGHES,
C. J.

Consent as to form:
William F. Hyland, Attorney General
of New Jersey
Attorney for Defendants-Appellants,
State of New Jersey, et al.

By: STEPHEN L. SKILLMAN,
Stephen L. Skillman,
Asst. Attorney General

Jamieson, McCardell, Moore, Peskin and Spicer

By: HERBERT F. MOORE
Herbert F. Moore

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 395-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

NOTICE OF MOTION.

To: Stephen L. Skillman, Esq.
Assistant Attorney General
State House
Trenton, N. J. 08625

NOTICE is hereby given by the undersigned, counsel for the plaintiffs-respondents, of the filing of a Motion with

the Supreme Court of New Jersey in accordance with the copy attached hereto.

Dated: November 26, 1975

JAMIESON, MCCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

JAMIESON, McCARDELL, MOORE, PESKIN
and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al,
Plaintiffs-Respondents,
and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants

MOTION FOR REMAND, STAY OF JUDGMENT AND CONTINUATION OF RESTRAINTS

TO: Honorable The Chief Justice
and Associate Justices of
Supreme Court of New Jersey:

The plaintiffs-respondents, City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and

DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.) move for an order of the New Jersey Supreme Court, in order of preference, and in the alternative, for the following relief:

A. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) all issues raised in the complaint; and (2) whether, and for what period, injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey;

B. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) taking of private property for public use without just compensation; (3) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

C. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

D. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

E. Stay of judgment and continuation of injunctive relief pending a determination by the United States Su-

preme Court of an application by plaintiffs for continuing injunctive relief pending appeal.

Plaintiffs-Respondents will rely upon the annexed Brief and Appendix in support of said Motion.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

AFFIDAVIT OF DAVID J. DAMIANO.

(November 24, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

---

1. I am the Commissioner of Streets of the City of Philadelphia and have personal knowledge of the matters contained herein.

2. In my capacity as Commissioner of Streets, I am legally charged with the duty to make suitable provisions for the disposal of solid waste materials collected by said City.

3. Until November 10, 1975, approximately 10,000 tons of solid waste was disposed of each week by incineration in facilities owned and operated by said City.

4. Solid waste incineration at the facilities referred to in paragraph 3 was discontinued by order of the United States District Court for the Eastern District of Pennsylvania because the operation of said facilities violated air pollution standards established by the United States Environmental Protection Agency.

5. In order to provide appropriate incineration facilities to comply with applicable air pollution requirements, it will cost approximately $100,000,000 and take 7 to 10 years.

6. When it was discovered that the aforesaid incineration facilities were violating federal air pollution standards, an analysis of alternative disposal possibilities was undertaken. Potential landfill sites in the Commonwealth of Pennsylvania and the State of New Jersey were identified and the feasibility of such sites was evaluated.

7. A solid waste disposal system serving a major metropolitan area must be reliable and easily accessible. Factors considered in choosing suitable sites include capacity, distance, highway patterns, traffic congestion, roadway weight limitations, and cost.

8. An assessment has been made by my department of landfill sites in Pennsylvania on file with the Department of Environmental Resources (DER) within a 100 mile radius of the City of Philadelphia.

9. No site in Pennsylvania has been found which offers the degree of dependability essential to any reasonable solid waste disposal plan.

10. Solid waste collected in the City of Philadelphia is compacted at plants owned and operated by the City and placed upon 65 yard tractor-trailer trucks for transfer to disposal sites. The use of such plants permits solid waste collection vehicles to engage in collection services to the greatest possible degree by alleviating them from the necessity of travelling to far off disposal sites. It also reduces the number of vehicles that would otherwise travel to such sites.

11. Traffic congestion upon Pennsylvania roadways around Philadelphia is acute. It is not possible to establish a firm schedule containing the requisite dependability under such circumstances.

12. County and local roadways leading to landfill facilities in Pennsylvania which have been assessed by my department presently have weight limitations which would exclude 65 yard tractor-trailers. The experience with snow removal on roadways to the west of Philadelphia has been unsatisfactory and mitigates against their use as a dependable roadway network for solid waste disposal purposes.

13. Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively empowered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever.

14. My department has learned that private contractors have heretofore entered into agreements with landfill operators to take effect in the event solid waste collection in Pennsylvania cannot be disposed of in New Jersey. Such arrangements have exhausted potentially available

landfill acreage at the sites in Pennsylvania which could be used for truck haul.

15. Even if the arrangements referred to in paragraph 14 of this statement had not been made and landfill space was available in Pennsylvania, the City of Philadelphia could not responsibly have entered into agreements with said landfills for the reasons expressed in paragraphs 11 and 12 of this statement. In addition, the distance of said sites from the City would require the purchase of additional vehicles which are not available for immediate delivery.

16. If all solid waste collected in the City of Philadelphia is not disposed of on a daily basis, a critical health problem would quickly develop. Facilities do not exist for accumulating household solid waste products. Such waste would necessarily pile up upon the streets of the City and present an immediate threat to the health and safety of the residents thereof and to the quality of the environment.

17. A thorough and diligent search for suitable disposal sites within the City has been made and no such sites have been located.

18. The only short term feasible solution to solve Philadelphia's disposal problems has been to reclaim strip mines situated in the western part of the Commonwealth of Pennsylvania. Serious and concerted efforts to establish a pilot project have been underway since 1967 with the assistance and full cooperation of the United States Environmental Protection Agency.

19. It is estimated that by 1978, 20 per cent of Philadelphia's solid waste will be hauled by rail to strip mines. Specifications for the project are in the process of being completed. Immediate effectuation of the plan cannot be implemented because special order railway rolling stock must be manufactured in connection with the plan.

20. Until the reliability and dependability of the rail haul proposal has been demonstrated, it would not be reasonable to contemplate the disposal of greater quantities of solid waste in such manner.

21. The single alternative which would adequately insure the timely disposal of Philadelphia's solid waste at the present time is incineration in the facilities referred to in paragraph 3 of this statement.

22. The air pollution occasioned by such incineration would adversely affect the residents of both the Commonwealth of Pennsylvania and the State of New Jersey.

23. The City of Philadelphia has no alternatives within the foreseeable future other than incinerating its solid waste in violation of the order of the Federal District Court or permitting same to accumulate upon the streets of the City. My department has continuously explored other viable disposal plans, and is still doing so on an ongoing basis, but no alternatives other than those stated in this paragraph are presently available.

24. Approximately 225,000 persons come to Philadelphia from New Jersey each working day. Upon information and belief, said persons generate a substantial quantity of solid waste which must be disposed of by the City of Philadelphia.

Commonwealth of Pennsylvania:

County of Philadelphia:

Affidavit

David J. Damiano, being duly sworn according to law deposes and says that he is Commissioner of Streets for the City of Philadelphia, and that the facts set forth in the attached statement are true and correct to his personal knowledge.

DAVID J. DAMIANO
David J. Damiano

Sworn to and subscribed before me this 24th day of November, 1975.

CATHERINE M. ARRA
Catherine M. Arra, Notary Public
Philadelphia, Philadelphia County
My Commission Expires Dec. 5, 1977
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF MARVIN MAHAN.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc. a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. MAC Sanitary Landfill, Inc. and Kinsley's Landfill, Inc. which operate sanitary landfill facilities in Gloucester County, New Jersey are wholly owned subsidiaries of Scientific, Inc.

3. MAC Sanitary Landfill, Inc. leases approximately 80 acres of land, of which approximately 36 acres are used for sanitary landfill purposes. Pursuant to engineering plans and designs heretofore filed with the New Jersey Department of Environmental Protection, it is anticipated at least 500,000 tons of solid waste can be disposed of at said sanitary landfill facility.

4. The site owned and operated by Kinsley's Landfill, Inc. is comprised of approximately 335 acres of land of which approximately 65 acres are presently used for sanitary landfill purposes. Preliminary elevation plans have been filed with the New Jersey Department of Environmental Protection for the entire remaining portion of the tract, and engineering plans and designs are in the process of being completed. It is presently anticipated that not less than 15,000,000 tons of solid waste can be disposed of at said landfill site.

5. In order for Kinsley's Landfill, Inc. to operate a sanitary landfill facility upon the aforesaid 65 acre tract, it was required by the Department of Environmental Protection that certain environmental controls be provided for the site. Said environmental controls cost approximately $500,000, almost all of which has been spent by Kinsley's.

6. At the time the aforesaid 335 acres were purchased for operation of a sanitary landfill by Kinsley's Landfill, Inc., and environmental controls were made upon the 65

acre portion of said tract, an agreement was reached with the City of Philadelphia for the disposal of solid waste originating in said City. The aforesaid 335 acre tract would not have been purchased and the environmental improvements thereto would not have been made in the absence of said agreement.

7. MAC and Kinsley presently have a contract with the City of Philadelphia for a minimum of 800,000 cubic yards (200,000 tons) and a maximum of 1,200,000 cubic yards (300,000 tons) which runs for 10 years and is of vital importance to the ability of MAC and Kinsley's to continue in operation.

8. In a study prepared for Gloucester County by Roy Weston, a consulting engineer, it was estimated that the total domestic solid waste generated in Gloucester County for the year 1975 would be 95,000 tons and that the projected domestic solid waste to be generated in said County during 1985 would be 150,000 tons.

9. There are presently 12 sanitary landfill facilities operating in Gloucester County, New Jersey.

10. Both the MAC and Kinsley landfills were planned and developed to handle primarily solid waste from Pennsylvania and the City of Philadelphia. At present, approximately 80 per cent of the total volume originates from either Pennsylvania or the City of Philadelphia. In the event the out-of-state ban is enforced, it will be necessary to either close one or both of the landfills from lack of volume. In addition, it will be necessary to apply to the Public Utility Commission for a substantial increase to make up for the loss of revenue that will result from

the exclusion of out-of-state refuse. Without such a rate increase, the landfill will not be able to operate.

MARVIN N. MAHAN
Marvin N. Mahan

Sworn to and Subscribed before me this 25th day of November, 1975.

ARTHUR MEISEL
Arthur Meisel
Atty. at Law of N. J.

AFFIDAVIT OF RICHARD A. PELUSO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

— and —

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach,* 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.° This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania, and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

*Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me
this 25th day of November, 1975.
FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

AFFIDAVIT OF ARTHUR MEISEL.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

— and —

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

ARTHUR MEISEL, of full age, being duly sworn according to law, upon his oath, says:

1. I am an Attorney-at-Law licensed to practice in the State of New Jersey, and have personal knowledge of the matters contained herein.

2. On Friday, November 21, 1975, I had a telephone conference with Mark L. First, Esquiré, a Deputy Attorney General. Mr. First stated to me that there were existing plans to provide additional acreage for disposal purposes in the Hackensack Meadowlands District.

ARTHUR MEISEL
Arthur Meisel

Sworn to and subscribed before me
this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards
Notary Public of New Jersey
My Commission Expires May 29, 1976

AFFIDAVIT OF JOHN P. FAZZIO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

Civil Action

CITY OF PHILADELPHIA, etc., et als.,
Plaintiffs-Respondents,

— and —

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiff-Intervenors-Respondents,

— against —

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } *ss.:*

I, JOHN P. FAZZIO, of full age, being duly sworn according to law upon my oath, depose and say;

1. I am the President of John P. Fazzio Landfill, Inc., trading as John P. Fazzio Landfill Co., a solid waste disposal utility of the State of New Jersey.

2. I make this affidavit in support of the Respondent's application to the Supreme Court of the State of New Jersey to stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc. t/a John P. Fazzio Landfill Co. v. State of New Jersey, et als.

3. Since 1969, the John P. Fazzio Landfill Co. has been accepting waste that has been generated within the State of Pennsylvania and this waste has been deposited at the John P. Fazzio Landfill Co. in accordance with the rules and regulations of the New Jersey Department of Environmental Protection and under the constant supervision of the New Jersey Department of Environmental Protection.

4. About Seventy-Five (75%) per cent of all waste deposited at the John P. Fazzio Landfill Co. originates in the State of Pennsylvania.

5. The New Jersey Department of Environmental Protection, Bureau of Solid Waste Management has stated that the John P. Fazzio Landfill Co. is one of New Jersey's largest landfills as far as quantities of waste being deposited.

6. If the Honorable Supreme Court of the State of New Jersey does not stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co. v. State of New Jersey, et als., the adverse results to the John P. Fazzio Landfill Co. will be serious, immediate and irreparable and will cause the John P. Fazzio Landfill Co. to cease its solid waste disposal operations because the company will not be able to operate with the loss of Seventy-Five (75%) per cent of its revenues.

7. Once the John P. Fazzio Landfill Co. is closed, the lease with the owners of the land upon which the landfill is situated, i.e. Bell Harbor, Inc., will be terminated and this landfill area will be forever lost because the owners of the land will use it for commercial and housing purposes.

8. The John P. Fazzio Landfill Co. has numerous fixed costs and has undergone substantial costs and will undergo costs of approximately $2,000,000.00 to purchase its new site and to install environmental protection liners, environmental protection dikes, environmental protection leachate collection systems, etc. and the John P. Fazzio Landfill Co. will not be able to continue its operations with a loss of Seventy-Five (75%) per cent of its income.

9. If the Honorable Supreme Court of New Jersey does not stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Co. v. State of New Jersey, et als., the numerous residents of the State of New Jersey who depend upon the solid waste disposal services of the John P. Fazzio Landfill Co. will not be able to use the facilities of the John P. Fazzio Landfill Co. if it closes.

10. The closing of the John P. Fazzio Landfill Co. will result in even less landfill area that can be used by the residents and citizens of the State of New Jersey as well as the residents and citizens of the State of Pennsylvania.

11. I make this affidavit to the Honorable Court to stay its decision in the matter of City of Philadelphia, etc., et als. and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Co. v. State of New Jersey, et als., until Respondent John P. Fazzio Co. can present its appeal to the United States Supreme Court and until such time as the United States Supreme Court agrees to hear the appeal and until it acts

on our intended request for a stay of the decision of this Honorable Court.

JOHN P. FAZZIO (Pres.)
John P. Fazzio

Sworn and subscribed to before me this 25 day of November, 1975.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

AFFIDAVIT OF JOSEPH PETRUZZI.

(November 25, 1975.)

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } *ss.:*

I, JOSEPH PETRUZZI, of full age, being duly sworn according to law, depose and say:

1. I am the Mayor of the Borough of Bellmawr in the County of Camden, State of New Jersey.

2. The John P. Fazzio Landfill Co. is located in the Borough of Bellmawr, County of Camden, State of New Jersey.

3. The Borough of Bellmawr depends upon the solid waste disposal services of the John P. Fazzio Landfill Co.

4. The John P. Fazzio Landfill Co. has operated its sanitary landfill in a manner that has not been offensive or detrimental to the community.

5. The John P. Fazzio Landfill Co. has notified the Borough of Bellmawr that if the decision of this Honorable Court in the matter of City of Philadelphia, etc., et als., and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et als., is not stayed, then the John P. Fazzio Co. will not be able to continue its sanitary landfill operations with the ban of Pennsylvania wastes and the loss of substantial revenues to John P. Fazzio Landfill Co.

6. If the John P. Fazzio Landfill Co. closes and discontinues its sanitary landfill operations, the Borough of Bellmawr may be left with no other sanitary landfill for disposal of its wastes. Without a proper place to dispose of its solid waste, the Borough of Bellmawr would face an immediate and irreparable health crisis.

7. Additionally, I believe that the people of the State of Pennsylvania and the people of the City of Philadelphia should be given more time in order to develop reasonable alternatives within the State of Pennsylvania to its solid waste crisis.

8. I make this affidavit in support of the application of the John P. Fazzio Landfill Co. to have the Honorable Supreme Court of New Jersey stay its decision in the matter of City of Philadelphia, etc., et als., and John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al. v. State of New Jersey, et als.

JOSEPH PETRUZZI
Joseph Petruzzi

Sworn and subscribed to before me this 25th day of November, 1975.

VINCENT J. DOTOLI,
Vincent J. Dotoli,
An Attorney at Law of the State of New Jersey.

LETTER FROM MAYOR OF BOROUGH OF RUNNEMEDE TO ACTING DIRECTOR, DIVISION OF MARINE SERVICES, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION DATED DECEMBER 6, 1974.

(Letterhead of)

BOROUGH OF RUNNEMEDE

December 6, 1974

Mr. Donald T. Graham, Acting Director
Division of Marine Services
Department of Environmental Protection
P. O. Box 1889
Trenton, New Jersey 08625

Re: Bell Harbor, Inc.
Type B Wetlands Permit

Dear Mr. Graham:

This is to advise you that at the regular meeting of Mayor and Council held in December 3, 1974, the governing body officially and publicly stated they were in favor of Bell Harbors application permit being approved.

The Borough of Runnemede has contacted for landfill facilities for several years with the Fazzio Landfill. During that time we have observed that the landfill has been operated in a safe, adequate and proper manner and has complied with the standards and regulations set forth by the New Jersey Department of Environmental Protection.

It is our understanding that unless permission is granted, the landfill will be closed very shortly. At this time we have no other landfill available that could not

only render the present service, but would create an additional hardship if we were to be forced to travel a greater distance and at a much higher cost.

Therefore, Mayor and Council urgently request that the Bell Harbor application be given very careful consideration and hopefully approved so that this essential facility may continue their landfill operation.

Thanking you for your consideration in the above matter, I remain.

Very truly yours,
DAVID L. VENELLA,
David L. Venella,
Mayor, Borough of Runnemede

cc:
John P. Fazzio

The Honorable Hermia Lechner, Division of Water Resources
Thomas E. Hampton, Supervisor, Wetlands Section
Michael E. Heenehan, Hearing Examiner
Colonel C. A. Selleck, Dept. of the Army, Corps of Engineers
James Johnson, Supervisor Riparian Section
Vincent J. Dotoli, Law Offices

AFFIDAVIT OF BERNHARDT V. LIND.
(December 8, 1975.)

AFFIDAVIT.

STATE OF NEW JERSEY }
COUNTY OF MERCER } SS.:

BERNHARDT V. LIND, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Chief of the Bureau of Solid Waste Management in the Office of Solid Waste Administration within the Department of Environmental Protection. I have held this position since March 1973.

2. The records of the State of New Jersey, Department of Environmental Protection, Bureau of Solid Waste Management indicate that in the calendar year 1974 2.4 million tons of out-of-state waste was buried in New Jersey landfills, an increase of .9 million tons over the previous year. Of that 2.4 million tons of waste 1.7 million tons originated in the State of Pennsylvania and .7 million tons originated in the State of New York.

3. The records of the Bureau of Solid Waste Management further indicate that all of the 1.7 million tons of Pennsylvania generated waste are disposed of in 13 New Jersey landfills. These 13 landfills which accept a total of 2.9 million tons per year of waste have a total life expectancy of 1.6 years assuming the same volume of disposal. If out-of-state waste were to be excluded these sites would have a total life expectancy of 3.9 years. The resultant increase of life expectancy in these landfills would make it possible for the Department of Environmental Protection ("DEP") to delay approval of the opening of new landfills and/or the expansion of old landfills in the

hopes of finding a viable alternative method of disposal and thus obviating the necessity of laying waste to additional New Jersey acreage. Of the 13 landfills which accept Pennsylvania waste for disposal, 6 have applications pending with or have indicated their intention to apply to the DEP for increased height limitations at their landfills or for the approval of additional acreage. In addition, there is an application currently pending to operate a 92 acre site in Bordentown Township. The thirteen landfills are:

a. Amadei Landfill—a 53.5 acre site located in Gloucester Township, New Jersey, approximately 10 miles from Center City Philadelphia. This facility has had yearly loadings of 272,000 tons, 9,800 of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

b. Buzby Brothers Landfill—a 19.5 acre site located in Voorhees Township, New Jersey, approximately 9 miles from Center City Philadelphia. This facility has yearly loadings of 117,000 tons, 7,000 tons of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

c. John P. Fazzio Landfill—a 38 acre site located in Bellmawr Borough, New Jersey, approximately 10 miles from Center City Philadelphia. This facility has yearly loadings of 794,000 tons, 540,000 tons of which originate in Pennsylvania. This landfill has reached capacity but is still operating.

d. Florence Landfill—a 30.5 acre site located in Florence Township, New Jersey, approximately 27 miles from Center City Philadelphia. This site has yearly loadings of 13,000 tons, 4,000 tons of which

originate in Pennsylvania. This site has a remaining capacity of 157,000 tons.

e. Harris Landfill—a 26 acre site located in Harrison Township, New Jersey, approximately 22 miles from Center City Philadelphia. This facility has yearly loadings of 12,600 tons, 1,055 of which originate in Pennsylvania. This landfill has 220,000 tons of life remaining.

f. Hawthorne, Inc. Landfill—a 60 acre site located in National Park Borough, New Jersey, approximately 12 miles from Center City Philadelphia. This site accepts demolition material only and has a yearly loading of 31,000 tons, 8,600 tons of which originate in Pennsylvania. This site has a remaining capacity of 85,800 tons.

g. Kinsley Landfill—a 67.3 acre site located in Deptford, New Jersey, approximately 16 miles from Center City Philadelphia. This site with the M. A. C. site have yearly loadings of 627,000 tons, 531,000 tons of which originate in Pennsylvania (accurate separate figures are not available for these sites). This site has a remaining capacity of 1,000,000 tons.

h. Kramer Landfill—an 88.5 acre site located in Mantua Township, New Jersey, approximately 17 miles from Center City Philadelphia. The loadings at this facility are 253,000 tons, 8,500 tons of which originate in Pennsylvania. This site has a remaining capacity of 260,000 tons.

i. Landfill and Development Company—a 162.8 acre site located in Mt. Holly, New Jersey approximately 26 miles from Center City Philadelphia. This site has yearly loadings of 434,000 tons, 220,000 of which originate in Pennsylvania. This site has a remaining capacity of 1,500,000 tons.

j. M. A. C. Landfill—a 38.9 acre site located in Deptford, New Jersey approximately 16 miles from Center City Philadelphia. For loadings, see Kinsley above. This site has reached capacity but is still operating.

k. Q. T. Landfill—a 6 acre site located in Quinton Township, New Jersey approximately 40 miles from Center City Philadelphia. This site has yearly loadings of 7,045 tons, 7,025 of which originate in Pennsylvania. This site has a remaining capacity of 38,000 tons.

l. Ward Landfill—a 26.2 acre site located in Pennsauken Township, New Jersey, approximately 8 miles from Center City Philadelphia. This site has yearly loadings of 198,000 tons, 139,000 tons of which originate in Pennsylvania. This site has a remaining capacity of 80,000 tons.

m. Warner Company Landfill—a 93 acre site located in Cinnaminson Township, New Jersey, approximately 12 miles from Center City Philadelphia. This site has yearly loadings of 310,000 tons, 213,000 tons of which originate in Pennsylvania. This site has reached its capacity but is still operating.

4. The records of the DEP indicate that two of the four sanitary landfill plaintiffs in the *Philadelphia* case, Fazzio and M. A. C., have reached maximum capacity and, thus, should be terminated. In addition, the Warner Company landfill in Cinnaminson Township, New Jersey, which takes 213,000 tons per year of Pennsylvania waste has reached capacity. Thus, 3 landfills which accommo-

date 53% of the Pennsylvania waste disposed of in New Jersey have reached capacity. Two other landfills, Amadei and Buzby Brothers, have reached maximum capacity but are still operating. Unless the disposal of out-of-state waste is terminated, the Department may be forced to allow these landfills to exceed their capacities and/or approve additional acres for landfilling.

5. The M. A. C. landfill is a 38.9 acre site. M. A. C. has applied to the DEP for approval to increase its height limitation from 34 feet to 68 feet. This application should probably be, but has not yet been, denied because of the existing leachate problem at the site.

6. The Kinsley landfill is a 67.3 acre site. Kinsley has neither filed an application with the DEP for approval of additional landfill acreage or for approval to increase height limitations at its existing site, although informal submissions have been made. If out-of-state waste were to be excluded there would be no present need to increase the landfill acreage or the height limitation.

7. The Fazzio landfill is a 38 acre site. Fazzio has applied to the DEP for approval to landfill an additional 16.5 acres. If out-of-state were to be excluded, there would be no present need to increase the landfill acreage. Moreover, the existing Fazzio site has a serious leachate problem and has reached its capacity. Unless out-of-state waste is excluded the DEP may be forced to allow continued dumping at the Fazzio site. If the Fazzio site is closed and/or the expansion of the site is not allowed, New Jersey communities utilizing this facility could utilize the other New Jersey landfills in the area for disposal with little or no inconvenience or economic hardship. However, on information and belief, some of these communities dump for little or no charge at the Fazzio landfill.

8. A typical sanitary landfill in New Jersey has an area much less than 200 acres. For example, of the 13 landfills which currently accept Pennsylvania waste for disposal, none are 200 acres—7 of the sites are less than 50 acres, 5 of the sites are between 50 and 99 acres, and only one is over 100 acres.

9. On November 21, 1975, I visited the offices of the State of Pennsylvania, Department of Environmental Resources ("DER"), the agency responsible for solid waste administration, in Harrisburg, Pennsylvania. The purpose of my visit was to review the records maintained by the Department of Environmental Resources with respect to solid waste facilities in Pennsylvania to discuss same with DER representatives. On December 3 and 4, 1975, at my direction an employee of my Bureau again visited the DER offices in Harrisburg for further review of the DER records and for further discussion with DER representatives with respect to solid waste facilities in Pennsylvania. While I was at the DER, I was given copies of the following documents:

1). A paper written by Commissioner Damiano entitled "Feasibility Considerations for Establishing a Resource Recovery and Energy Recovery Program" dated November 22-24, 1975

2). A Paper written by Commissioner Damiano entitled "An Urban Solid Waste Strategy for Philadelphia" dated September 8, 1975

3). "A Plan for Solid Waste Management in Pennsylvania" dated June 1970 prepared by the Commonwealth of Pennsylvania, Department of Health (pps. 102-103 only are included herewith)

4). A DER summary of Philadelphia's efforts with respect to developing a solid waste plan.

5). A DER map showing permitted disposal sites in Pennsylvania within a 150 mile radius of Center City Philadelphia.

Said documents are attached hereto as Exhibits "A" through "E" respectively.

10. The records of the DER reveal that within Pennsylvania there are 8 sanitary landfills in a 50 mile radius of Center City Philadelphia capable of accommodating the amount of solid waste currently generated in Pennsylvania and now being disposed of in New Jersey landfills. Those landfills are:

a. Warner Company—a 62 acre site located in Falls Township, Pennsylvania, approximately 25 miles from Center City Philadelphia with a remaining capacity of 2,000,000 tons. Current loadings are 260,000 tons per year.

b. Francis Cloud Landfill—a 43 acre site located in Lower Oxford Township, Pennsylvania, approximately 40 miles from Center City Philadelphia with a remaining capacity of 275,000 tons. Current loadings are 1,300 tons per year.

c. Novak Landfill—a 60 acre site located in Allentown, Pennsylvania, approximately 40 miles from Center City Philadelphia with a remaining capacity of 800,000 tons. Current loadings are 2,900 tons per year.

d. Western Berks Refuse Authority Landfill—a 41 acre site located in Shillington, Pennsylvania approximately 50 miles from Center City Philadelphia with a remaining capacity of 375,000 tons. Current loadings are 46,800 tons per year.

e. Pottstown Disposal—a 65 acre site, 22 acres of which are presently approved by DER, located in Pottstown, Pennsylvania, approximately 35 miles from Center City Philadelphia with a remaining capacity of 800,000 tons. (This does not include the potential capacity of the unapproved site.) Current loadings are 60,000 tons per year.

f. Chren Brothers Landfill—a 13 acre site located in Easton, Pennsylvania, approximately 35 miles from Center City Philadelphia with a remaining capacity of 386,000 tons. Current loadings are 78,000 tons per year. In addition, there is an application pending with the DER to landfill an additional 50 acres. Using Mr. Peluso's figures (Psa 22-35), this site, if approved, could accommodate 10,000 tons per week of solid waste for 3¾ years. The information with respect to the pending application was obtained in a telephone conversation with a representative of the landfill.

g. Berks Landfill Corporation—site located in Sinking Spring, Pennsylvania, approximately 45 miles from Center City Philadelphia with a remaining capacity of 5,000,000 tons. Current loadings are 255,000 tons per year. These figures were obtained in a telephone conversation with a representative of the company. The representative stated that they could double their current loadings with no problem.

h. Lanchester Corporation Landfill—an 85 acre site located in Honey Brook, Pennsylvania, with a remaining capacity of 4,000,000 tons. Current loadings are unavailable.

11. The records of the DER also reveal that a permit has been issued to the Strasburg Corporation to operate a

50 acre sanitary landfill in Newlin Township, Chester County, Pennsylvania. The site, located approximately 40 miles from Center City Philadelphia, has been approved, but is not yet operational. Using the figures in Mr. Peluso's affidavit (Psa 22-35), said site could accommodate 10,000 tons per week of solid waste for 3¾ years. I am aware of no reason why the City of Philadelphia could not utilize this site for disposal of its solid waste. While at the DER, I was informed that there are two currently operating but unapproved landfills within a 50 mile radius of Center City Philadelphia, Grand Central Landfill located in Northampton County, and F R & S located in Berks County. On information and belief these landfills could accommodate some of Philadelphia's solid waste.

12. Based on the review of the information available to us at the Pennsylvania DER and my conversations with Pennsylvania landfill operators, it is my opinion that there is sufficient landfill capacity in Pennsylvania within a 50 mile radius of Center City Philadelphia to accommodate the amount of Pennsylvania solid waste currently being disposed of in New Jersey landfills. Accordingly, if out-of-state solid waste can no longer be disposed of in New Jersey, it would not be necessary for Philadelphia to allow its solid waste to pile up on its streets. In addition, at the time P. L. 1973, c. 393 was to have gone into effect the DER developed an emergency plan to handle Pennsylvania solid waste being disposed of in New Jersey. On information and belief that emergency plan included a "gentleman's agreement" with the landfills in the surrounding Pennsylvania counties to accommodate Philadelphia's solid waste. Any difficulties which may be encountered in accommodating Philadelphia's waste in these landfills would not be due to lack of physical capacity but would be of a legal nature.

13. Based on the review of DER records and conversations with representatives of some of the 8 landfills in Pennsylvania, it is my opinion that these 8 sites have an estimated remaining capacity of 13,636,000 tons. This estimate does not include the potential for going higher on existing sites, changing the slope requirements on existing sites, or the approval or utilization of additional acreage. Based on DEP records, the 13 New Jersey landfills which currently accommodate Pennsylvania waste have a remaining capacity of 2,340,800 tons.

14. The maximum side slope permitted in Pennsylvania landfills is 15%, while the maximum side slope allowance in New Jersey landfills is 50%. If Pennsylvania's side slope regulations were relaxed or amended vast amounts of additional solid waste beyond the loadings indicated above could be accommodated in *existing* Pennsylvania landfills. In addition, the records of the DER reveal that the Montgomery County Landfill, which has an operating site which is close to capacity located in Upper Merion Township, Pennsylvania, approximately 17 miles from Center City Pennsylvania, intends to file shortly an application with the DER for a second site, adjacent to its existing site. The new site would be an adjacent quarry pit 1100 feet long by 900 wide by 130 feet deep with an estimated capacity of 2,380,000 tons. Again, using Mr. Peluso's figures, this site could accommodate 10,000 tons per week of solid waste for 4 years and 7 months.

15. The records of the DER reveal that the City of Philadelphia does not own or operate any sanitary landfills for raw solid waste and that the City of Philadelphia has never applied to the DER to own or operate a sanitary landfill. The records of the DER further reveal that the City of Philadelphia has included New Jersey sanitary landfills as a part of its solid waste management plan approved by the DER in October of 1975.

16. In an emergency situation, a sanitary landfill can be operational within 4 to 6 weeks from approval, depending upon the number and type of improvements which have to be made prior to commencing dumping operations. There is sufficient suitable land for sanitary landfill purposes in Pennsylvania within 50 miles of Center City Philadelphia on which sanitary landfills could be operated. See "A Plan for Solid Waste Management in Pennsylvania", Commonwealth of Pennsylvania, Department of Health (June 1970), portions of which are attached hereto as Exhibit "C". I know of no reason why the environmental and engineering problems associated with the commencement and operation of the sanitary landfills or in going to higher elevations on existing landfills would be any more difficult in Pennsylvania within a 50 mile radius of Philadelphia than they would be in New Jersey.

17. Representatives of the DER informed me that the City of Philadelphia's current rail haul proposal for solid waste is its eighth attempt at such a project since the late 1960's. The other rail haul projects were unsuccessful because Philadelphia could not secure the approval of the governmental officials in the proposed recipient counties.

18. I am aware of at least 4 companies that manufacture 65 cu. yd. transfer tractor-trailer solid waste vehicles. Either I or members of my staff have conferred by telephone with these companies and have received the following information:

1. Cobey Waste Control, Galion, Ohio

weight of the trailer	24,000 lbs.
maximum load	80,000 lbs.
cab (separate item)	18,000 lbs.
	122,000 lbs.

this firm could deliver 5 trailers within 90-120 days

2. Dempster Dumpster, Knoxville, Tennessee

weight of the trailer	24,500 lbs.
maximum load	40,000 lbs.
cab (average)	18,000 lbs.
	82,500 lbs.

This firm could deliver 5 trailers within 30 days and 50 trailers within 120 days

3. Heil Company, Milwaukee, Wisconsin

weight of trailer	23,000 lbs.
maximum load	100,000 lbs.
cab (average)	18,000 lbs.
	141,000 lbs.

This firm could deliver 5 trailers within 75 days

4. Peabody Company, Peabody, Ohio

weight of trailer	25,000 lbs.
maximum load	50,000 lbs.
cab (average)	18,000 lbs.
	93,000 lbs.

This firm could deliver 4 trailers per week starting anytime.

19. At the present time, the only viable method of solid waste disposal that exists in New Jersey is through sanitary landfills. Thus, sanitary landfills are necessary. However, even though they are necessary, they are, at best

a necessary evil. Sanitary landfills are a vast improvement over former open and often burning dumps and polluting incinerators. But sanitary landfills have environmental problems all their own. In New Jersey, virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases including methane, the same "natural" gas used in cooking and heating. It was once believed that solid waste could be used to make swamps into good, usable lands. Examination of terminated landfills reveal that their use for building purposes is not desirable due to the high cost of required pilings and gas accumulation prevention measures. The environmental insults resulting from sanitary landfills demand that the number, size and height of landfills be held to a minimum until such time as viable alternative methods are developed and implemented.

SWORN to and subscribed before me this 8th day of December, 1975.

BERNHARDT V. LIND
Bernhardt V. Lind

MARK L. FIRST
Attorney at Law
State of New Jersey

Exhibit "A".

CITY OF PHILADELPHIA
DEPARTMENT OF STREETS

FEASIBILITY CONSIDERATIONS FOR ESTABLISHING A RESOURCE AND ENERGY RECOVERY PROGRAM

PREPARED FOR

FOURTH NATIONAL CONGRESS
ON WASTE MANAGEMENT TECHNOLOGY
AND
RESOURCE AND ENERGY RECOVERY

Atlanta, Georgia

November 12-14, 1975

David J. Damiano
Commissioner
Streets Department

Feasibility considerations for establishing a resource and energy recovery program . . . marketing, economics, technology, administrative

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The fundamental problem faced by an urban area is to identify viable energy recovery opportunities. There is no substitute for professional engineering investigations and planning. However, I have yet to meet the municipal manager who is not deluged by myriads of proposals from self-appointed experts, salesmen, politicians, contractors, charlatans, whose problems are solved by signing on

the dotted line. The cardinal rule to follow is that the advice is worth the price paid for it! Nothing!

Philadelphia's approach to energy recovery dates to 1961 when the sixth municipal incinerator plant was under final engineering design. One option was an incinerator boiler unit to produce steam and sell to an adjacent Philadelphia Electric power plant ¼ mile away. The cost study including operation and capital amortization was 71¢/1,000 lbs. of steam as compared to fossil fuel of 55¢/1,000 lbs. which resulted in abandoning the concept at that time.

More recently the Penna. Dept. of Environmental Resources partially funded a $60,000 Resource Recovery or Energy Recovery Study. Recognizing that the recent energy crisis has made solid waste competitive as a substitute fuel, a renewed interest has developed to identify markets for steam or energy.

The first phase of our Resource Recovery Study was evaluation of six refuse-to-energy options which was a result of prior investigations and were prepared to be implemented. These opportunities were rank ordered in technical-economic feasibility, interest of the energy and/or steam consumer, time phasing with our refuse disposal needs, ability to integrate with the logistics of our system.

The second phase is a survey to identify new markets for energy or steam as well as R. D. F. preparation as a fossil fuel substitutes. However, although studies of markets are continuing capitalizing on present opportunities is a prudent course for cities to follow. One such opportunity is an existing center-city steam loop, owned and operated by Philadelphia Electric Company, serving five square mile area of downtown Philadelphia. Customers include department stores, office buildings, hotels, apartment houses, 13 major hospitals, two universities, two

newspaper plants, and most of the federal, state, and city properties in this area. In addition to space heating, this steam is used for numerous process requirements and for air-conditioning. The load varies from 2,500,000 lb./hr. in the winter to roughly 500,000 lb./hr. in the summer, thus providing a year-round market. All of the steam is generated in oil fire boilers, and 300,000 to 500,000 lb./hr. of new oil fired capacity is anticipated to be required by 1978 or 1979. Philadelphia's energy conservation project proposes to substitute a refuse fired boiler plant for the Philadelphia Electric planned new oil fired facility. The refuse fired energy conservation plant proposed consists of a modern, aesthetically designed building completely enclosing the required refuse receipt and storage facilities, four, 400 tons per day furnaces and their ancillaries. The energy plant is geared to steam demand requirements of the Philadelphia Electric steam loop, details of which are being developed with Philadelphia Electric. This partnership is a unique situation involving a major urban area and its utility company.

The alternatives available for reliable production of refuse derived steam have been narrowed to the most feasible, based on current and emerging technology, which can be easily implemented without waiting for technological developments. This concept involves furnaces of waterfall construction for direct combustion of received refuse on a mechanical grate system providing useful low pressure steam. Each furnace unit will have comprehensive air pollution control systems consisting of a conditioning tower, electrostatic precipitators, induced draft fan, and stack. Provision will be made for recovering ferrous material from the residue and its sale to scrap industry.

Some of the developments in Phase I that surface as criteria may be of interest to other cities.

1. In addition to the market opportunity, one of the essential ingredients in developing a successful refuse-to-energy program, is to have an interested, willing, and cooperative customer. Both the President and staff of Philadelphia Electric Company have extended themselves to the fullest in analysis, data, planning and programming the project. Their singular effort and commitment to the refuse-to-energy project is the most important factor contributing to its success.

2. Refuse collection and disposal being the second highest municipal expenditure, the City cannot afford to subsidize alternate systems or processes. Initial studies of our system and anticipated income from steam sales indicate the project is self-sustaining and/or a savings will result attributable to the reduction of our present disposal costs.

3. The impact of this facility on refuse collection requires no major changes in scheduling, routing, and transfer location making it very favorable from a sanitation operations point of view. Therefore, we will not face any additional collection costs to take advantage of this opportunity.

4. Time phasing is a three to five year term to provide on line steam to the customer and is the normal time period for engineering study, design, and construction for public works facilities to obtain the optimum bid and construction costs. No unnecessary costs will be found for time phasing the on line steam demand.

5. Competent technical consulting engineering services with particular expertise in refuse-to-energy systems is essential. In addition to technical-economic feasibility of each refuse-to-energy project, the consultants sensitivity to systems, reliability, performance, legal, contractual,

financial, requirements are some factors which constitute part of the overall project.

6. One of the most important factors in a refuse-to-energy project is siting. In urban areas, land is scarce. In this case, an abandoned railroad yard is conveniently located within a ¼ mile of the steam loop of the center-city business district of the Philadelphia Electric Company. There is sufficient land area to site the plant with suitable access and egress for refuse collection trucks and trailers from an expressway. Little or no change will take place with the traffic pattern in adjacent neighborhoods, an important factor to community acceptance.

7. The benefits of the Philadelphia Electric Company's refuse-to-energy project are:

Conservation—Energy conservation; refuse being substituted for oil, conserving an estimated 630,000 barrels per year, roughly equivalent to 30,000 domestic oil heated homes per year. This is enough oil saved to provide heating requirements for 100,000 people or 5% of the City's population.

Economics—A potential reduction in refuse disposal costs of 10% from $10/ton conventional method to $9/ton.

Environmental—Reduction in air pollution in critical center city location of Philadelphia's basin and in land requirements for refuse disposal.

Employment—Underprivileged low income residents facing 14% unemployment crisis, will have an additional 100 jobs of higher skill and training opportunities available to them.

Uniqueness—Demonstrate a government-utility partnership acting with one another in the consumers' interest.

Urban Crisis—Independent of social and educational programs, the urban crisis that is faced is a fiscal dilemma. The second highest municipal expenditure is refuse handling and disposal. Future costs are escalating at an unprecedented rate. This project will affect 30% of the total refuse disposal budget of the City.

Timeliness—Energy crisis has demanded exploration of new opportunities for energy conservation. This is reflected in the Federal Energy Program and the Energy Research and Development Agency Program and policies. The Philadelphia Program offers an immediately implementable energy conservation measure which does not require a decade or more of research to become useful to the customers of our urban area.

The preliminary investigations of the aforementioned seven points is more than ample incentive for the City of Philadelphia to pursue a refuse-to-energy project. The subsequent steps are the traditional final engineering design, bid, construction, and operation of the facility. However, several unique considerations in the implementation phase should be elaborated on for the guidance and information of other cities.

1. Contract for steam sales. Terms and conditions for contract with the customer Philadelphia Electric Company will be fully developed and executed before any major capital commitments are made. Contract must address a term of 25 years, rate structure with percentage credits of fossil fuels, capital facilities credit, base load demand, peak load demand, summer/winter load with appropriate guarantees and penalties for consumer protection shall be developed.

2. With capital requirements in excess of $50 million, this is beyond the normal financing capability of the City. New institutional arrangements, via utility, authority or

alternate form of a public agency must be investigated to carry out project. Concurrently an I. R. S. ruling will be pursued to take advantage of an unique private/or authority arrangement to benefit the investment tax credit and accelerated depreciation for the eligible components of the facility and the low cost financing through bonds for a public agency. It is possible to realize an interest rate in five to eight per cent range for financing capital cost of this facility.

3. A unique approach saving time, construction cost, an unnecessary duplication of efforts from the conventional specification bid and construction routine will be employed. It is commonly known that the incinerator-boiler furnaces and appurtenances constitute some 45% of the total construction cost and the building enclosure is normally tailored to fit the equipment manufactured. The unique approach to be employed will be prior to final engineering building design, the pre-purchase of incinerator-boiler equipment on performance specifications will be made directly from the manufacturer.

With known equipment and manufacturer and supplier, the consultants will then be directed to proceed with final building design of the supports and enclosure around details furnished by manufacturer.

The successful bids by the building contractor will stipulate installation of the equipment pre-purchased by the City to be furnished and installed concurrent with the building and mechanical trades contracts.

This will result in an overall savings in time and costs to the City and a more efficient installation.

4. In conclusion, to demonstrate the confidence level and cooperation in a unique government-private utility arrangement, an agreement was reached to carry out the next phase of this project. The $400,000 in design and

engineering funds to move the project to the next stages of completion will be shared equally between the City of Philadelphia and Philadelphia Electric Company. This reinforces the point made in the beginning of our discussion where the most important ingredient is a successful refuse-to-energy project is an interested, willing and cooperative joint venture by the government and the customer.

Exhibit "B".

CITY OF PHILADELPHIA
DEPARTMENT OF STREETS

AN URBAN SOLID WASTE STRATEGY FOR PHILADELPHIA

PREPARED FOR

DEPARTMENT OF ENVIRONMENTAL RESOURCES
Harrisburg, Pennsylvania

September 8, 1975

DAVID J. DAMIANO
Commissioner
Streets Department

AN URBAN SOLID WASTE STRATEGY FOR PHILADELPHIA

The City of Philadelphia is a major historical, cultural, educational and medical center for some two million residents in a 129 square mile area. Municipal solid waste generation is roughly 1,000,000 tons per year with a comparable amount of commercial and industrial waste privately.

Philadelphia's urban strategy for solid waste management is a rigorous one. Faced with required conformance to a municipal air management code and Pennsylvania's Solid Waste Management Act 241, spiralling waste generation, increased fuel costs and energy consumption, rapidly diminishing surface disposal space including New Jersey's refuse importation litigation, and public insistence on resource conservation and recovery, the City has had

to marshal its forces—technical, financial, political and administrative—in urgent response. Resultant efforts have involved Federal and State government, technical consultants, and private sector industry in a unique multi-party cooperative setting. Out of this, concerted action to develop efficient, economic, and environmentally-sound short and long-range plans for Philadelphia solid waste management has evolved.

Philadelphia currently incinerates 350,000 tons per year of refuse and landfills 650,000 tons per year. Two modern, continuous-feed 750 ton per day municipal incinerators operate; recent tests show both of these installations easily satisfying Federal incinerator guidelines since being retrofitted with advanced electrostatic precipitators. The City also maintains four batch-fed incinerators which are being overhauled as refuse transfer stations; conversion is 90% complete. These facilities presently process roughly 2000 tons per day of refuse.

The City uses two New Jersey disposal sites, one in Deptford Township and one in Mt. Holly. Of the ten-year, 1000-ton per day service contracts the City has at both sites, roughly nine years remain.

The 1968 passage of Pennsylvania's Solid Waste Management Act 241 required cities and counties across the state to prepare solid waste management plans. Two years later Philadelphia Streets Department engaged consultant services to assist in the City's $250,000 plan. This marked the beginning of recent future-oriented solid waste planning activity in Philadelphia.

Subsequent action has been taken on several major fronts.

RAIL HAUL OF SOLID WASTE.

All solid waste processing systems leave some irreducible residue requiring disposal. Sanitary landfilling,

the one total disposal method, is predicated on the availability of suitably-zoned land area. The scarcity of such land is a problem besetting Philadelphia and many other major urban centers across the country.

Up until 1971 the City deposited raw refuse and incinerator residue at seven local land disposal sites. Most of these sites have since been completed, sold, or ordered to close. The need for alternate municipal disposal options was underscored when in 1973 New Jersey's legislature passed a law banning out-of-state refuse importation. A joint appeal by New Jersey landfill operators, USEPA, and the City of Philadelphia succeeded in revoking the law as unconstitutional interference with interstate commerce. The urgent need for land disposal sites remained however. The City looked to its rail haul project.

Philadelphia rail haul was first conceived of during the late 1960's. At that time the rail transport of municipal solid waste to the anthracite coal regions of Pennsylvania was planned as a private enterprise venture. It was defeated, however, by public opposition.

In 1972 the Streets Department applied for a $6 million Rail Haul Demonstration Grant in national competition and was awarded $500,000 in preliminary funds. The purpose of the grant was to demonstrate the technical, economic, and environmental feasibility of solid waste rail haul for the reclamation of remote abandoned strip mines. Originally conceived of as a government-to-government system (i.e., with governmental agencies handling all phases of operation except actual rail transport), the Pennsylvania Land Restoration Task Force was formed composed of USEPA, the Pennsylvania Department of Environmental Resources (DER), the City of Philadelphia, and its engineering consultant, Leonard S. Wegman Co. Inc. Twenty-seven Pennsylvania counties were considered for strip mine disposal. When public referendums proved

the government-to-government approach untenable at that time, private enterprise involvement in the Demonstration Project was intensified. The private sector appeared capable of executing such a system and in addition, owned and operated much needed disposal space.

A prequalification stage ensued with public notice placed in local and national newspapers to maximize exposure to the private sector. This advance solicitation required capability on the contractors' part of rail hauling a minimum of 1000 tons per day of solid waste furnished by the City of Philadelphia, on a continuous basis for up to 20 years to a remote disposal site. Ancillary requirements included:

1. Union agreement to operate in the event of a rail strike.
2. Local transfer to a railroad siding.
3. Rail access from Philadelphia to the disposal site.
4. Pennsylvania Department of Environmental Resources Module I approval towards an operating permit for the site.
5. Local and county government approvals.
6. U. S. Bureau of Mines approval, where applicable.
7. Evidence of ownership or control of the site.
8. Right to use the site as a landfill.
9. Proper site zoning.

Prospective bidders were required to have experience in the operation of a sanitary landfill of 1000 tons per day or more and a mechanized transfer station of 500 tons per eight hour day or more; and technical and management capabilities in solid waste projects of comparable scope and magnitude. The City's Standard Questionnaire and Financial Statement were also included.

The successful prequalification of Browning-Ferris Industries, Waste Management, Inc. and Waste Resources Inc. was officially announced in April 1975. The Task Force is currently assisting prequalifiers with their respective bid packages. System performance specifications are being developed by the Leonard S. Wegman Company. Bid advertisement is scheduled for September 1975.

A unique public/private financing arrangement characterizes the Rail Haul Demonstration Project. Under a recent Internal Revenue Service ruling, Philadelphia secured access to a leveraged-leasing option whereby both the City as lessee and a financial intermediary as lessor provide capital funds toward facility purchase. With a financial intermediary (corporation or individual) interposed between the long-term source of capital and the City, lower long-term capital and interest costs can be realized by the City. At the same time, the financial intermediary purchases the tax advantages of ownership—investment depreciation and a substantial tax credit if the facility is run by a private corporation. Both parties benefit via this optimal financial arrangement.

CONVERSION OF REFUSE TO ENERGY.

Philadelphia's commission of a refuse energy recovery feasibility study signalled another phase of the City's comprehensive study of solid waste management. The Leonard S. Wegman Co. Inc. was retained as the City's technical consultants to perform this in-depth analysis of contemporary energy recovery alternates.

Engineering evaluations were made of several major thermal conversion systems including prepared refuse as a supplementary fuel, mass burning of raw refuse with steam recovery, pyrolysis, and specific proposals prepared and presented to the City by several of America's largest in-

dustrial organizations. The study scope also encompassed sewage sludge disposal and the potential impact of refuse and residue output from energy recovery plants on the Rail Haul Demonstration Project.

The plan recommended by the Wegman firm superimposes a new, modern 1600 ton per day thermal conversion facility on the City's current program of upgrading its continuous-feed incinerators and converting four batch-fed incinerators into transfer stations. An extraordinary opportunity exists for siting such a refuse-to-steam conversion plant within the City where direct tie-in to the Philadelphia Electric Company's (PEC) business district steam loop can be made.

This plan together with other components of the City's disposal program would provide for the disposal of some 15,000 tons per week of Philadelphia's refuse, roughly corresponding to the actual amount collected by City forces. Railyard siting also allows rail haul of recovered materials to secondary markets and residue to remote landfills. In addition a rail transport system for raw refuse represents an interim measure until an energy recovery system comes on stream.

The recommended energy recovery plant is an aesthetically designed structure completely enclosing all refuse receipt and storage facilities, four 400 ton per day furnaces and ancillary equipment. The furnaces are to be of water-wall construction for direct combustion of as-received refuse on continuous-feed grate systems to provide useful low pressure steam. Each furnace unit will be equipped with a comprehensive air pollution control sequence including conditioning tower, electrostatic precipitator, induced draft fan and individual clarified gas effluent stack. Provision will also be made for recovering ferrous from residue for sale to the scrap industry.

Philadelphia is currently evaluating the proposed implementation of this project. Private sector services would be required for all major construction and equipment procurement and installation phases. A financing mechanism similar to that developed for the Rail Haul Demonstration Project is also being prepared to benefit both municipal and private sectors. The next project phase involves a City/PEC joint venture to determine specific engineering and economic parameters relating to eventual design of the energy plant.

MARKETING OF RECOVERED MATERIALS.

Successful long-term marketing of commodities separated and converted from waste is necessary to close the recovery cycle. Philadelphia has received a grant from the Department of Environmental Resources to conduct a study of the marketability of energy and materials recovered from municipal refuse. This investigation is to consider fuels, steam, electricity, paper, metals, glass, plastics, rubber, wood and compost. Topics of study include potential markets for recoverables, competitive products and supplies, advantages and disadvantages of recoverables versus established products, current market volumes, haul costs to potential customers, process changes required for the sale of recoverables, prevailing scrap prices, potential market displacement and market growth outlook.

This effort will require extensive contact with the private sector. Local, regional, and national industry will be solicited as potential purchasers of recovered materials. Concurrently, utilities, industries, public and private institutions and other major energy consumers will be directly involved in the investigation of markets for refuse-derived energy.

One such prospective buyer already identified is the Department of the Navy. The City has recently conferred

with the Naval Facilities Engineering Command regarding a project to provide processed solid waste fuel to their Shipyard power plant in Philadelphia. The system envisioned by the Navy would yield a long-term supply of economical fuel for their power plant while providing a dependable, low-cost disposal method for a significant portion of total City refuse. This plan would also further the causes of resource and energy conservation and environmental protection—while exemplifying progressive multipartite collaboration. Initial discussions have called for total project financing and facility construction and operation by the Navy's selected contractor. There would be no obligation of Navy funds other than for the final purchase of refuse-derived fuel. Philadelphia and the Navy could contract directly for refuse supply rather than the City dealing with the Navy's contractor.

• • •

THE ROLE OF PRIVATE ENTERPRISE.

The magnitude and complexity of contemporary urban waste management requires unprecedented municipal sophistication. The ever-increasing generation of waste in our consumer-oriented society has left collection and disposal technology far behind. The need for innovative, long-range planning to accommodate the environment —both physical and fiscal—within which municipalities operate is only now being addressed. Philadelphia's comprehensive strategy represents one such approach.

The emergence of private, stockholder-owned companies in the municipal refuse field is a new and important development. The private sector often maintains legal, financial, and managerial capabilities surpassing those available within current municipal settings. Privately-owned companies are increasingly demonstrating success

in performing the traditional local government operations of solid waste collection and disposal.

With private enterprise involvement a key to the success of large-scale recovery endeavors, the maintenance of effective communication channels between sectors becomes essential. Where the mutually-beneficial nature of secondary recovery and marketing efforts is recognized, cooperative collaboration between City and private sector can be enhanced. In such a manner can Philadelphia and other urban areas most effectively manage and make productive use of their solid waste.

Exhibit "C".

EXCERPT FROM
A PLAN FOR SOLID WASTE MANAGEMENT
IN PENNSYLVANIA

Commonwealth of Pennsylvania
Department of Health
Bureau of Housing and Environmental Control
Solid Waste Section

Solid Waste Publication 3

June 1970

[102]

2—PHILADELPHIA METROPOLITAN REGION

Bucks, Chester, Delaware, Montgomery and Philadelphia Counties

Five counties, a 20th of the Commonwealth's area, contain a third of its people. Philadelphia Metropolitan Region in southeastern Pennsylvania, economic leader of the Commonwealth, is the source of 37 percent of the State's personal income, 35 percent of the real property income, 41 percent of assets in financial institutions. Its 3.9 million population represents the greatest concentration of people in the State, a density exceeding 16,000 per square mile in its center.

The City of Philadelphia is the region's population center. The region is the nation's fourth largest manufacturing center and its diversity is illustrated by the fact that there are more than 100 companies in 15 of the 20 classifications frequently used to identify industries. This region has been the State's fastest growing area in population. Montgomery, Delaware and Bucks Counties have nearly doubled in population size since 1950.

Within this region, there are 3,909,515 people who live in 236 municipalities. These 236 municipalities include three cities that have 58 percent of the people, 88 boroughs which house 11 percent, 28 first class townships with 13 percent and 117 second class townships which have 18 percent of the people.

Solid Waste Survey Information

The Philadelphia Metropolitan Region discards approximately 6.74 million tons of solid waste in a year.

On-site storage of solid waste is not regulated by an official agency for 32 percent of the population in the region. Of the remaining 68 percent, 27 percent of the people have their solid waste storage practices regulated by health agencies, 30 percent by police agencies and 43 percent by other types of municipal agencies. These figures indicate that on-site storage of solid waste has been a very neglected portion of this region's solid waste management system.

Seventy-four percent of the people are served by municipalities that have jurisdiction over their collection systems, either by ordinance or contract. The collection of household solid waste is performed by private collectors for 48 percent of the population. Five percent of the households handle their own waste and 47 percent have their's collected by public collectors.

Commercial refuse is collected by private collectors at 80 percent of the stores. Public collection accounts for 14 percent of the commercial waste and the other six percent is taken to the disposal site by the individual store owners. There are 366 scrap and salvage yards within the region and 22,213 abandoned vehicles were collected

in a year. There were 3,603,334 tons of solid waste collected in one year. The source of the waste was as follows: household, 1,402,573 tons; commercial, 233,925 tons; combined household and commercial, 1,111,524 tons; with the remaining 855,312 tons coming from other sources. The funds budgeted to collect this waste were $21,955,441.

The disposal of solid waste in the region is approximately two-thirds by land disposal and one-third by incinerator. Backyard burning is a volume reduction method which is tolerated in 55 percent of the municipalities. However, 86 percent of the communities do have ordinances controlling but not necessarily prohibiting this practice. Fifty-one percent of the municipalities have commercial, industrial, institutional and agricultural businesses which burn solid waste on their premises and 86 percent of these have ordinances governing this practice. There are 151 promiscuous dumps in the region.

Approximately 55 percent of the 56 organized land disposal sites are operated by municipalities. However, only 49 percent are owned by them. The remaining landfills are privately owned and operated. The average compliance rating with the State established rating system for sanitary landfills is 52 percent. Air pollution is caused by 52.9 percent of the sites and 23.5 percent contribute to water pollution. The water pollution problems are generally due to poor location from a soil and geological standpoint. Presently, $6,800,815 is budgeted for disposal in the region.

Soil Suitability For Sanitary Landfill

The Philadelphia Metropolitan Region has a higher percentage of soil which is suitable for the normal sanitary landfill operation than any other region in the State. The region is 2,183 square miles in area and 32 percent of

the soils are suitable for sanitary landfill. Although 700 square miles are suitable, only 440 square miles are in areas which are not presently used for industrial, commercial or residential purposes.

[103]

These soils are also the soils of choice for all types of construction, recreational and agricultural uses. Therefore, the competition for this land is very keen.

Industrial Solid Waste

The Philadelphia Metropolitan Region contains 6,197 manufacturing and agricultural industrial establishments. All together, they produce more than 2.8 million tons of waste per year. The region's industries are diversified without any one dominating the picture. The following is a breakdown of the waste produced in eight of the 20 Standard Industrial Classifications.

Industry	Tons/Year
(1) Machinery, Except Electrical	307,800
(2) Apparel and Related Products	26,200
(3) Electrical Machinery, Equipment & Supplies	35,720
(4) Food & Kindred Products	186,000
(5) Fabricated Metal Products	136,000
(6) Chemical & Allied Products	61,600
(7) Printing, Publishing & Allied Products	6,060
(8) Instruments & Related Products	2,970

Although the region occupies only five percent of the land area in Pennsylvania, it has about one-third of all the

industries. With the number of diversified industries in the region, the recycling of waste products should become a reality within the near future.

Action Groups For Solid Waste Management

There are two refuse authorities in this region, both located in Chester County. West Chester Authority operates a landfill to serve the Borough of West Chester and six surrounding townships. The site serves approximately 30,000 people. Each of the authority members has passed an ordinance requiring that refuse generated within its boundaries be disposed of at the Authority Landfill. The Southeast Chester County Refuse Authority is comprised of eight municipalities with a population of approximately 20,000. Refuse generated within the member municipalities is disposed of at the Authority Landfill but non-member municipalities are also allowed to use the site for disposal.

Delaware County organized a County Solid Waste Disposal Department in the late fifties and opened its first incinerator in 1960. The county is now operating three incinerators and will shortly begin construction of a new five million dollar rotary kiln incinerator. Municipal refuse is accepted at the incinerators with no charge. Commercial collections also are accepted but are charged a fee. The incinerators serve 49 municipalities, approximately 600,000 persons. The county is divided into geographical areas with municipalities in each area designated to deliver to a specific incinerator.

The City of Philadelphia also operates a system of incinerators to dispose of refuse generated within the city. At present, six incinerators and three residue disposal sites serve the needs of the city.

Bucks County Natural Resources Division operates a county landfill and has purchased land to include a transfer station in its system. A reduction facility is proposed to be installed at the landfill to improve the efficiency of the entire operation.

Montgomery County has recently assumed responsibility for refuse disposal on a county-wide basis. The county has received a permit to convert a limestone quarry to a landfill. The quarry will be pumped dry, sealed with a membrane rubber base and will be provided with a collection and treatment system for the leachate produced. This site, operated with a system of transfer stations, is expected to serve approximately one-half million people. It is expected to be opened prior to the end of 1970.

Montgomery County had several refuse study groups that have dissolved since responsibility for refuse disposal was assumed by the county.

The Downingtown Regional Study Group is active in Chester County. The group is informally organized but receives the backing of the member municipalities. Its purpose is to gather information and to make recommendations to the seven member municipalities.

The Bucks County Solid Refuse Advisory Board was established in 1967 to study methods of solid refuse disposal. A Master Solid Wastes Disposal Plan for Bucks County was published in 1967. This was prepared by a consulting engineering firm under contract to the County Commissioners.

All of the counties in this region have planning commissions and all are actively preparing solid waste management plans.

Bucks, Montgomery, Chester and Delaware Counties and the City of Philadelphia also are members of the Delaware Valley Regional Planning Commission (DVRPC). to which several municipalities in New Jersey belong. DVRPC is an interstate agency charged with improving

the quality of the environment through a comprehensive program of regional planning.

In 1969, DVRPC contracted with the Fels Institute of Local and State Government, University of Pennsylvania, to survey the solid waste problems of the region.

Exhibit "D".

SOLID WASTE MANAGEMENT PLANNING
PHILADELPHIA CITY

May 1972-March 1973

Development and submittal of the solid waste management plan tasks outlining 14 options including landfilling, railhaul, incinerator, steam generation, and resource recovery.

March 21, 1973

In response to the Department's review of September, 1972, Philadelphia submits additional information regarding waste generation, collection districts, delineation of processing and disposal facilities to be used.

May 17, 1973

In response to the Department's review of April 18, 1973 Philadelphia submits a further breakdown of potential disposal sites and selects the rail-haul option for implementation.

May 30, 1973

In response to a meeting of May 17, 1973 Philadelphia submits additional information regarding disposal of commercial, industrial, and institutional wastes with a schedule for the closure of batch fed incinerators and unsuitable residue sites.

November 16, 1973

In response to the Department's review of August 30, 1973 information regarding hazardous and pathological wastes is submitted.

May 7, 1974

In response to the Department's review of December 27, 1973 regulations for pathological and hazardous wastes are submitted.

August 8, 1974

The Department disapproves Philadelphia's management plan based on the City's inability to implement the rail-haul option.

September 3, 1974

The City appeals the Department's action to the Environmental Hearing Board.

November 7, 1974

In response to the Department's action of August 8, 1974 Philadelphia submits an amendment to the plan selecting an option of upgraded incineration, transfer, and disposal at landfills in Pennsylvania and New Jersey while noting continued efforts at implementation of a limited rail-haul program.

December 14, 1974

In response to the Department's review of November 13, 1974 Philadelphia identifies sites to be utilized with schedule for upgrading of incineration and transfer along with information on capacities of existing and proposed sites.

May 1, 1975

In response to the Department's review of March 17, 1975 Philadelphia details methods of control of collection and disposal of wastes handled by private collectors within the City and provides additional information on sites to be utilized.

September 5, 1975

In response to the Department's review of August 29, 1975 Philadelphia submits an addendum to the plan stating that new contracts for waste disposal will be signed by 1980 for an additional five year period and that insurance of capacity for private haulers for the period 1980-1985 will be accomplished.

October 30, 1975

The Department approves the Solid Waste Management Plan for the City of Philadelphia.

Related Solid Waste Management Planning

June, 1975-July, 1976

As a supplement to the management plan, the City initiated the development of a solid waste management marketing study for resource recovery which along with attendant studies have identified the following potential markets:

1. Philadelphia Electric Company through a direct tie-in to the business district steam loop could utilize steam from a 1600 ton per day thermal conversion facility.
2. Department of the Navy shipyard power plant in the City for utilization of processed solid waste fuel.
3. Existing industries and secondary materials outlets for utilization of recoverables.

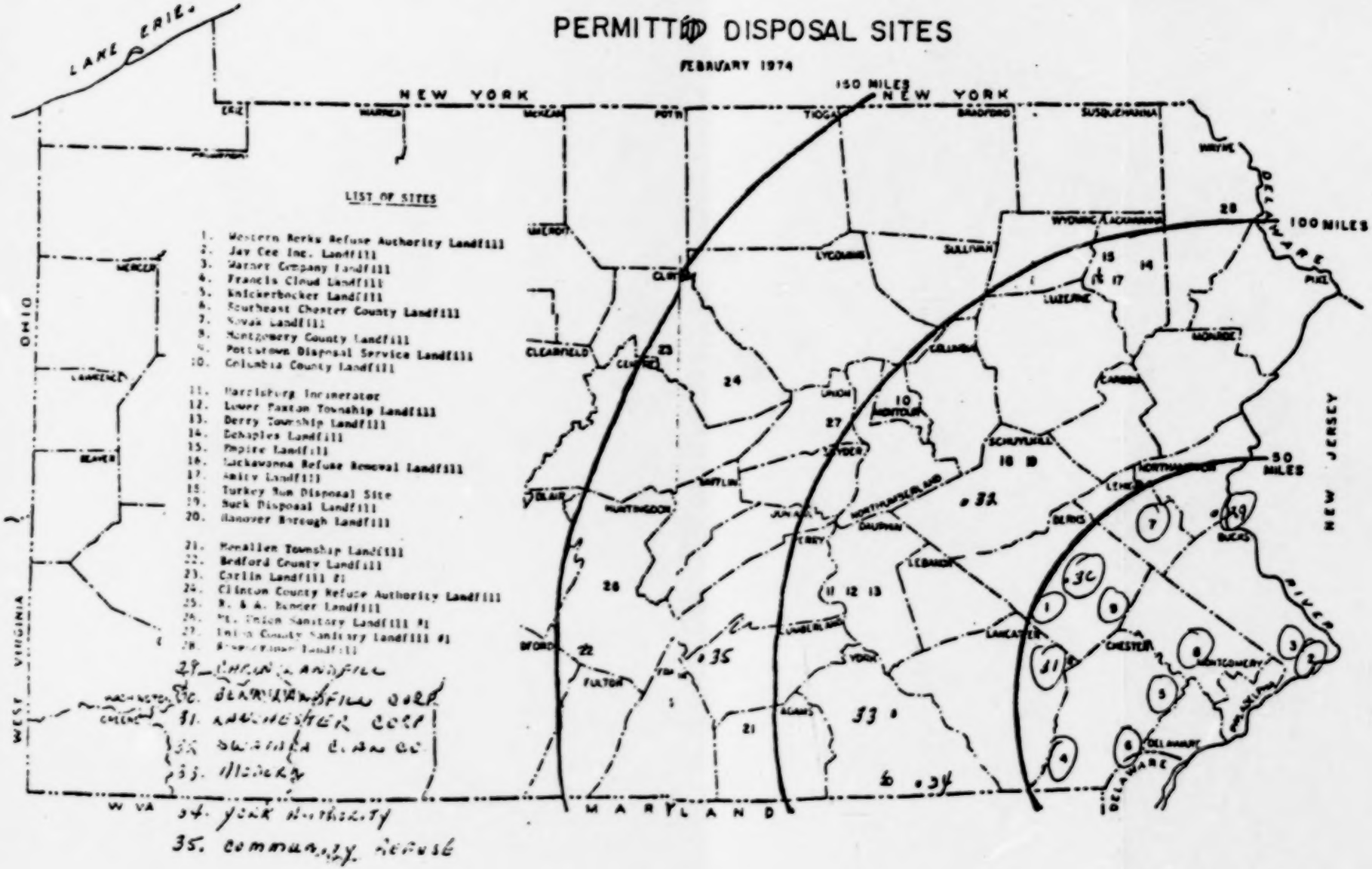
A-284-A285

Exhibit "E" to Lind Affidavit

FIGURE 3

PERMITTED DISPOSAL SITES

FEBRUARY 1974



SUPPLEMENT TO RESPONDENTS' BRIEF.

(November 26, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74
September Term 1974
Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT:

We have just obtained possession of copies of the transcript in the Matter of the Petition of B. Horstmann before the Board of Public Utility Commissioners. A copy of the title page is annexed hereto. In the course of this hearing the principal witness was Bartley R. Carhart. Mr. Carhart was the Project Director on the Commission staff to the County and Municipal Government Study Com-

mission which prepared the publication *Solid Waste: A Coordinated Approach.* Upon direct examination Mr. Carhart acknowledged that he was the author of said document, which is generally referred to as the Musto Report. (See page 217 of the transcript attached hereto.)

During the course of the hearing in the *Horstmann* matter, the Hearing Examiner in considering the admissibility of the report, observed that "hearsay is definitely involved" and that "everybody is aware of the limitations of this report". (See page 233 of the transcript attached hereto.)

This information was brought to our attention yesterday and could not be included in our brief.

Respectfully submitted,

JAMIESON, MCCARDELL, MOORE,
PESKIN AND SPICER
A Professional Corporation
Attorneys for Plaintiffs-Respondents

By HERBERT F. MOORE
Herbert F. Moore

Dated: November 26, 1975

BOARD OF PUBLIC UTILITY COMMISSIONERS
NEWARK, NEW JERSEY
WEDNESDAY, JANUARY 17, 1973

Docket No. 7210-861

In the matter of the petition of B. Horstmann under R. S. 40:55-50 for a determination that the operation of a sanitary landfill in the Township of East Hanover in the County of Morris, New Jersey, is reasonably necessary for the service, convenience or welfare of the public.

Docket No. 7210-871

In the matter of the petition of F. William Horstmann's Garbage Dump.

BEFORE EXAMINER LAWRENCE R. CODEY, ESQ.
HEARING EXAMINER

For the Petitioner, appears:
Spinrad, Steinberg & Schwartz, Esqs.
By: Theodore A. Schwartz, Esq.
33 Evergreen Place
East Orange, New Jersey
and
Frederick G. Stickel, III, Jr.
11 Commerce Street
Newark, New Jersey

For Sandoz-Wander, Inc., appears:
Rosen & Weiss, Esqs.
By: Howard T. Rosen, Esq.
and Walter G. Rinehard, Esq.
Gateway I
Newark, New Jersey

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[217]

EXAMINER CODEY: If I may take over for just a second.

Could you just give us your educational background.

THE WITNESS: Yes. I hold a Bachelor and Master's degree in political science, urban problems from Rutgers University.

EXAMINER CODEY: And what is your occupational experience?

THE WITNESS: I have worked since 1968 for this Commission, upon graduating from college.

Q. And you are, in effect, the author of this report?
A. Yes.

MR. STICKEL: I would like to introduce this report in evidence, Mr. Codey. I have brought additional copies here.

MR. INFINITO: We don't know what's in that report to make it in evidence.

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[233]

EXAMINER CODEY: Let's continue with the witness.

MR. IACOPINO: My objection is a little different. Again, we are talking about a man who compiled this report supposedly during '69 and '70 or '70 and '71, I am not sure here, who went to work in '68, and he's talking about something that occurred in '68. It's obviously hearsay and obviously opinions of people who talked to him and there's no way we are going

to know they are valid opinions and it's not the type of testimony this Board should rely on.

EXAMINER CODEY: I will allow the witness to continue and I think everybody is aware of the limitations of this report and of the witness and the fact that hearsay is definitely involved, but for whatever probative value it has, it will become the subject of examination and cross examination by you gentlemen.

• • •

AFFIDAVIT OF STEPHEN WASSERSUG.

(December 5, 1975.)

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74
SEPTEMBER TERM 1974
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

STEPHEN WASSERSUG, of full age, being duly sworn according to law, upon his oath, says:

1. I am Director of the Enforcement Division of the Region III Office of the U. S. Environmental Protection Agency (E. P. A.).

2. In the recent past the City operated four (4) batch fed and two (2) continuous fed incinerators to dispose of solid waste. Investigation by the staff of Region III of the E. P. A. determined that none of these incinerators complied with air pollution emission limitations adopted by

E. P. A., pursuant to The Clean Air Act of 1970 as amended (The Act). On October 3, 1974 the City of Philadelphia entered into a Consent Order with the E. P. A. which required the closing of all four (4) batch fed incinerators and upgrading of the two (2) continuous fed incinerators.

3. Emission data in our enforcement files, submitted by the City in 1974, indicates that the total particular matter emission from the four (4) batch fed incinerators is approximately 3,450 tons of particulate matter per year. Since we consider any point source which emits more than 100 tons per year to be a major air pollution source, we believe that operation of these incinerators can have a significant impact on ambient air quality in the metropolitan Philadelphia interstate air quality region, including the counties of Burlington, Camden, Gloucester, Mercer and Salem in the state of New Jersey.

4. We have been advised by the City that all four (4) batch fed incinerators have been shut down. Subsequent use of these incinerators would be a violation of the above referenced order which was issued pursuant to Section 113 of The Act (42 USC § 1857(c)-8).

5. Since the four (4) batch fed incinerators are quite old it may not be cost effective to upgrade them for the purpose of complying with applicable air pollution standards.

STEPHEN WASSERSUG
Stephen Wassersug

Sworn to and subscribed before me this 5th day of December, 1975.

JAMES B. CORTRIGHT
James B. Cortright, Notary Public
Radnor Township, Delaware County
My Commission Expires May 29, 1978

AFFIDAVIT OF WESLEY E. GILBERTSON.

(December 5, 1975.)

SUPREME COURT OF NEW JERSEY
DOCKET No. A-82-74
September Term 1974
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN } *ss.:*

WESLEY E. GILBERTSON, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Deputy Secretary for Environmental Protection and Regulation in the Department of Environmental Resources of the Commonwealth of Pennsylvania.

2. There is a statutory mandate in Pennsylvania that all municipalities with a population density of more than 300 inhabitants per square mile must develop a plan for solid waste management to be approved by the Department of Environmental Resources. The City of Philadelphia commenced work on developing a solid waste management plan in 1969. In order to encourage the rapid development of these plans, the State of Pennsylvania does provide financial assistance to the municipalities for the engagement of consultants and other costs incidental to the development of a plan for solid waste management. By May of 1973 Philadelphia had submitted a significant portion of its plan. Since that time there has been a series of conferences and evaluations by Department of Environmental Resources and revisions made in the plan. The final plan for Philadelphia was approved by this Department on October 30, 1975. This plan is basically a long-range program and is not intended to meet emergency conditions.

3. All landfill owners and processing station operators in Pennsylvania must obtain permits from the Department of Environmental Resources. Consequently, this Department has knowledge of the location of landfills in Pennsylvania, their capacities and availabilities to various municipalities throughout the State.

4. The sanitary landfills within a 50-mile radius of Philadelphia do not offer a total solution to Philadelphia's immediate waste disposal problem. I believe that there are significant logistic problems facing Philadelphia in reaching these landfills. The capacity of these landfills is such that they can take but a small portion of Philadelphia's solid waste at the present time.

5. Philadelphia's only other feasible alternative is to open up the incinerators ordered closed by the United States Environmental Protection Agency, Region 3, in the event the restraints on the implementation of New Jersey's statutory solid waste ban are not continued. Use of these incinerators would be in violation of the existing consent order entered into between the City of Philadelphia and the United States Environmental Protection Agency.

6. Without the continuation of the restraints, Philadelphia faces a serious health hazard. Philadelphia's solid waste cannot be adequately disposed of at the present time without the use of landfills in New Jersey.

7. There are sanitary landfills in Pennsylvania presently disposing of solid waste originating in New Jersey. These sanitary landfills are servicing municipalities in New Jersey as well as private haulers in New Jersey who in turn are servicing industrial and commercial accounts in New Jersey.

WESLEY E. GILBERTSON
Wesley E. Gilbertson

Sworn to and Subscribed before me this 5th day of December, 1975.

RICHARD A. RAGSDALE
Richard A. Ragsdale
Attorney at Law of the State of
New Jersey

SUPREME COURT OF NEW JERSEY
M-436 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Movants,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-433 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay and continuation of injunctive relief is denied; and it is further

ORDERED that the order temporarily staying the judgment and injunctive order, entered November 20, 1975, is vacated, effective December 31, 1975.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC.
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER

A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
Docket No. L-15068-73 P.W.
Civil Action

CITY OF PHILADELPHIA, etc, et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ORDER

This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs, Herbert F. Moore, Esq. appearing, in the presence of Stephen L. Skillman, Esq., Assistant Attorney General of the State of New Jersey, attorney for defendants, and Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors, and good cause being shown,

It is on this 19th day of December, 1975:

ORDERED, that Counts II, III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII contained in plaintiffs' complaint in lieu of prerogative writs filed in

the above captioned matter are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that Counts Two, Three, Four, Five, Six, Seven and Eight of the amended complaint filed by plaintiffs-intervenors in the above captioned matter, are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VIII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter.

GEORGE Y. SCHOCH, J. S. C.
William F. Hyland, Attorney General of New Jersey
Attorney for Defendants

By: STEPHEN SKILLMAN
Assistant Attorney General

Consent as to form and entry.
JAMIESON, McCARDELL, MOORE, PESKIN and SPICER, *A Professional Corporation*
Attorneys for Plaintiffs

By: ARTHUR MEISEL
VINCENT J. DOTOLI,
Attorney for Plaintiff-Intervenors

SUPREME COURT OF THE UNITED STATES

No. A-563

CITY OF PHILADELPHIA, ET AL.,
Appellants

v.

NEW JERSEY, ET AL.

ORDER.

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey entered November 18, 1975, in case No. A-82, be and the same is hereby, stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 31
day of December, 1975

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By FRANCIS J. CORSON

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),
Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, reversing the trial court's declaration that P. L. 1973, c. 363 unconstitutionally discriminates against interstate commerce, entered in this action on November 18, 1975.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
Counsel for Appellants

by: HERBERT F. MOORE

Dated: January 8, 1976

Supreme Court of the United States

—

No. A-24

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

—

ORDER.

—

UPON CONSIDERATION of the application of counsel for the petitioners, the response filed thereto, the memorandum of the United States as Amicus Curiae, and the reply of petitioners,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey, A-82, entered June 20, 1977, be and the same is hereby stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or

postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of July, 1977

A true copy Michael Rodak, Jr.
Test:
Clerk of the Supreme Court of the United States

By Laurence P. Gill
Deputy

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

—

No. _____

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.)
Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey entered on June 20, 1977, on Remand from the Supreme Court of the United States.

Appellants further appeal from the prior judgment of the Supreme Court of the State of New Jersey entered in this action on November 18, 1975, which judgment was vacated by the Supreme Court of the United States by its mandate issued on March 22, 1977, and subsequently reaffirmed by the Supreme Court of New Jersey by its judgment entered on June 20, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(2). Review will be sought, in the alternative, by certiorari pursuant to 28 U. S. C. § 1257(3).

JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER
A Professional Corporation
Counsel for Appellants

by: /s/ HERBERT F. MOORE
Herbert F. Moore
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511

Dated: July 22, 1977

Certificate of Service.

I hereby certify that on this 22nd day of July, 1977, a copy of the Notice of Appeal was mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, to Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080, and to David N. Samson, Esq., attorney for defendants-respondents in the companion case Hackensack Meadowlands v. Mun. Landfill Auth., A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052; and to Honorable Wade H. McCree, Jr., Solicitor General of the United States Department of Justice, Washington, D. C. 20430.

I further certify a that all parties required to be served have been served.

HERBERT F. MOORE
Herbert F. Moore

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY — LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn according to law, upon his oath says:

1. I am the President of Landfill and Development Company (hereinafter L & D), a public utility of the State of New Jersey holding a duly issued temporary Certificate of Public Convenience and Necessity by the New Jersey Public Utilities Commission. L & D duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a Sanitary Landfill Registration Certificate, and a temporary certificate was duly issued by said Department.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. The disposal of solid waste is governed by Chapter VIII, "Refuse Disposal" of the New Jersey State Sanitary Code, which Code is enforced by the aforesaid Department of Environmental Protection.

4. In accordance with authority conferred by N. J. S. A. 13:1E-1 et seq. and N. J. S. A. 13:1I-1 et seq., the said Department of Environmental Protection proposed a comprehensive revision to the Rules of the Bureau of Solid Waste Management which would further govern and regulate the operation of sanitary landfills in New Jersey, including the treatment and disposal of solid waste therein.

5. L & D has entered into a written contract with the City of Philadelphia pursuant to which L & D has agreed to treat and dispose of a stated quantity of solid waste which originates or is collected in said City.

6. Section 7:26-1.8.2, being one section in the aforesaid proposed Revision to the Rules of the Bureau of Solid Waste Management, provides that,

"no person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside of the territorial limits of this State."

7. In addition, P. L. 1973, c. 363 which will become effective February 1, 1974, provides that no wastes generated outside of the State of New Jersey shall be treated or disposed of within said State, and further provides as follows:

"No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974 (a) determine that waste which originates or was collected outside of New Jersey can be disposed of within said state without endangering the public health, safety and welfare and (b) promulgates regulations permitting and regulating the treatment and disposal of such waste, then L & D will be prohibited from the further treatment and disposal of waste in accordance with the terms of its written contract with the City of Philadelphia.

9. If L & D is prohibited from fulfilling the terms of its obligations with the City of Philadelphia, it will lose very substantial and considerable profits, and will suffer

grievous damages, the amount of which cannot be calculated with any reasonable certainty.

Based upon existing regulations governing the treatment and disposal of solid waste, the State of New Jersey will not be materially or substantially adversely affected by the issuance of a temporary restraining order, while on the other hand, the business of L and D would be grievously and substantially affected if such restraining order was not granted.

10. Upon information and belief the proposed Rule 7:26-1.8.2 and P. L. 1973, c. 363 was motivated by a desire on the part of the State of New Jersey to assure the availability of landfill acres in New Jersey for solid waste generated in that state and, as an incident thereto, to stabilize the cost of solid waste disposal for New Jersey residents. Said information and belief is based upon (a) a statement by the New Jersey Department of Environmental Protection appearing on pages 7 and 8 of a document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", a copy of which section is attached hereto and made part hereof as Exhibit A, and, (b) the last paragraph of a letter dated December 16, 1973 from Richard W. DeKorte, Counsel to the Governor to David Quient, Esquire, City Attorney of the City of Glen Cove, which states that S. 2367 (O. C. R.) (now P. L. 1973, c. 363) would not be introduced "had the sister states of New Jersey permitted solid wastes originating in our state to be disposed of at or near the point of origination." A copy of said letter is attached hereto and made part hereof as Exhibit B.

11. Accordingly, both P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 appear to be retaliatory in nature and not actually based

upon the immediate potential for harm to the health of the community.

12. Federal legislation encourages interstate and regional solutions, where applicable, to solid waste disposal and recovery as evidenced by 42 U. S. C. A. § 3254, a copy of which is attached hereto as Exhibit C.

13. In addition to the aforesaid, if L & D is prohibited from disposing of solid waste which originated or was collected outside of New Jersey, the continued operation of said sanitary landfill may be and become economically unfeasible, thereby impairing the public interest.

LEO F. HUGHES, 3RD
Leo F. Hughes, 3rd

Sworn to and subscribed before me this 16th day of January, 1974.

ARTHUR MEISEL
Arthur Meisel
Attorney at Law of New Jersey

Exhibit A.

• • •

IV. *Out-of-State Waste*

In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that

same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

• • •

Exhibit B.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel for the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 13, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Richard W. DeKorte
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

Exhibit C.

§ 3254. Encouragement of interstate and interlocal cooperation

The Secretary shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; encourage, where practicable, interstate, interlocal, and regional planning for, and the conduct of, interstate, interlocal, and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal.

MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR STAY PENDING COMPLETION OF REMAND AND FOR EXPEDITED BRIEFING AND ARGUMENT.

To: Clerk of the Court

Jamieson, McCardell, Moore,
Peskin & Spicer, Esqs.
Attorneys for Plaintiffs-Respondents
19 Chancery Lane
Trenton, New Jersey 08618
Attn: Herbert F. Moore, Esq.

Sirs:

Please Take Notice that the undersigned, representing the defendants-appellants, Department of Environmental Protection and Commissioner of Environmental Protection, hereby moves for clarification that the court's prior orders permit enforcement of chapter 363 of the Laws of 1973 or, in the alternative, for a stay of any lower court injunctive order which may be found presently to bar enforcement of chapter 363, and the defendants-appellants further move for the setting of an expedited schedule for the filing of briefs and oral argument on the remand from the Supreme Court of the United States.

In support of this motion, the defendants-appellants will rely upon the attached brief, affidavits and appendix.

William F. Hyland
Attorney General of New Jersey
Attorney for Defendants-Appellants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Commissioner of the Department of Environmental Protection.

By /s/ Stephen Skillman
Stephen Skillman
Assistant Attorney General

Dated: March 15, 1977

ORDER GRANTING MOTION FOR ACCELERATION

SUPREME COURT OF NEW JERSEY

September Term 1976

M-724 – M-725

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Movants.

This matter having been duly presented to the Court, it is Ordered that the motion for acceleration is granted; and it is further

Ordered that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further

Ordered that plaintiffs serve and file their brief on the merits on or before Wednesday, April 20, 1977 and that defendants serve and file their response thereto on or before Monday, May 2, 1977; and it is further

Ordered that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted.

Witness, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 4th day of April, 1977.

Florence R. Peshoe
Clerk

AFFIDAVIT OF FRANK J. KUSERK.

(May 6, 1977.)

STATE OF NEW JERSEY
COUNTY OF GLOUCESTER } *ss.:*

Frank J. Kuserk, being duly sworn according to law upon his oath deposes and says:

I am the Supervisor of Air and Water Conservation for Texaco Inc., at the Eagle Point Plant in Westville, N. J.

This plant generates biological sludge.

This sludge had been disposed of in New Jersey, at the Ken-buc Landfill in Edison, New Jersey. This landfill was recently closed down.

I inquired of the Department of Environmental Protection of the state of New Jersey for a location to send this sludge for disposal. I was informed that there was no facility available in New Jersey unless we could increase the solids content to 25%. The Department of Environmental Protection mailed me a list of facilities (attached) located in the state of Pennsylvania and suggested we use one of these.

We are presently disposing of the biological sludge generated by this plant in the state of Pennsylvania.

F. J. KUSERK
F. J. Kuserk

Sworn to and Subscribed before me this 6th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney-At-Law

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

From the desk of

BEATRICE S. TYLUTKI, *Director*

Solid Waste Administration

Frank Kuserk:

Enclosed is a list of alternative landfill sites located in Pennsylvania that may be able to handle your waste sludge.

I would suggest contacting these people directly and then finding a hauler to transport the sludge to one of these locations.

/s/ RON BUCHANAN

TABLE A

FACILITIES WITH APPROVED MAN-MADE LINERS IN PENNSYLVANIA.

[*Note: Balance of Table is not printed—original illegible.*]

AFFIDAVIT OF RAY ROTHSCHILD.

(June 27, 1977.)

STATE OF NEW JERSEY
COUNTY OF UNION } *ss.:*

RAY ROTHSCHILD, of full age, being duly sworn upon his oath, according to law, deposes and says:

1. I am the President of Perk Chemical Co., Inc. of 217 South First Street, Elizabeth, N. J.

2. Perk Chemical Co. is engaged, among other things, in the spent chemical removal and recycling business.

3. The majority of our spent chemical customers are small businesses whose processes create chemical waste that cannot be disposed of by conventional means. This company collects for several hundred companies throughout the entire State of New Jersey.

4. The recycling process creates a residual waste which cannot be disposed of in conventional sanitary landfill sites. Until July of 1976, Perk Chemical used Kin Buc Sanitary Landfill in Edison, N. J. to dispose of these wastes. Since the closing of Kin Buc we can no longer dispose in New Jersey.

5. I have contacted the New Jersey Department of Environmental Protection, Solid Waste Division and discussed this problem with Mr. Rosenberg. I have been advised by the DEP that there is no place in New Jersey suitable for this waste and Mr. Rosenberg has recommended facilities in Pennsylvania, New York and more distant states. Some of the waste we have been compelled to haul to disposal sites more than 500 miles from Elizabeth, N. J.

6. At the present time our operation, and consequently that of the many, many customers from which we collect, are totally dependent upon facilities outside the State of New Jersey for disposal.

RAY ROTHSCHILD
Ray Rothschild

Sworn to and Subscribed before me this 27th day of June, 1977.

/s/ BARBARA Q. CHODACH
A Notary Public of the State of New Jersey
My Commission Expires on 8/14/77

AFFIDAVIT OF WILBUR HENRY.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF SOMERSET } *ss.:*

WILBUR HENRY, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am the Manager of Purchasing, Organic Chemical Division of American Cyanamid, Bridgewater Township, Somerset County, New Jersey.

2. This Company generates a commercial chemical type of waste. For many years this waste was disposed of at a New Jersey facility identified as Kin Buc Landfill, Edison, N. J.

3. On July 2, 1976, the New Jersey Department of Environmental Protection advised American Cyanamid by a letter to Daniel Dowiak that it could no longer use the Kin Buc site for chemical waste disposal. A copy of that letter is attached.

4. The D. E. P. also forwarded to American Cyanamid, by the same letter, a list of facilities in New Jersey and various other states that were permitted to handle various types of waste.

5. I contacted all of the New Jersey facilities and for one reason or another they were unable to accept our entire output of this chemical waste.

6. Chem-Trol in Model Cities, New York agreed to accept this waste. For a time American Cyanamid did use the New York facility, however, for various reasons they were unable to continue to accept this waste.

7. I then located a facility in Pennsylvania which is the only facility we are using for disposal of this waste.

WILBUR HENRY
Wilbur Henry

Sworn to and Subscribed before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Solid Waste Administration
Trenton. 08625

BEATRICE S. TYLUTKI
Director

July 2, 1976

Mr. Dan Dowiak
American Cyanamid Company
Berdan Avenue
Wayne, NJ 07470

Dear Mr. Dowiak:

This is in response to your recent inquiry regarding mercury wastes from your Bound Brook plant and the advisability of disposing of this material at the Kin-Buc Landfill in Edison Township, Middlesex County, New Jersey.

The Kin-Buc Landfill has been registered with the Department of Environmental Protection since 1970 for the acceptance of chemical and hazardous waste and they continue to be so registered.

The Kin-Buc Landfill has been the site of numerous environmental problems in recent months. The site has been accepting quantities of chemical and hazardous wastes greatly exceeding the amount which it is capable of handling properly. In view of these problems and due to the type of waste (2% mercury in organic solution) you have described to us, the Solid Waste Administration does not recommend the disposal of this material by landfilling.

Attached is a list of Waste Processing Facilities. Please contact these facilities directly regarding their ability to accept your waste material. It is quite possible that these facilities will require the separation of the mercury from the solution before acceptance.

If we can be of any further help in this matter, please feel free to contact this office.

Very truly yours,

LINO F. PEREIRA
Lino F. Pereira
Supervising Environmental Specialist
Solid Waste Administration

oms
Attachment

NEW JERSEY

Facility	*Type of Treatment*	*Type of Waste Accepted*
Astro Pak Corp. P. O. Box 796 235 Forrest Street Metuchen, NJ 08840 (201) 549-1788	Neutralization	Petro-base wastes including still and tank bottoms, organic sludge, chemical wastes and chemical by-products.
Blackwood Carbon Products Little Gloucester Road Blackwood, NJ (609) 227-8822	Oil Recovery	Recycle waste oil to obtain Grade 4 industrial fuel oil.
Browning Ferris Industries Chemical Services Division P. O. Drawer C Pedricktown, NJ 08067 (609) 299-0835	Chem-Fix Lagoon	Liquid and semi-liquid waste that can be chem-fixed (Liq-Wa-Con Method). If approved by BSWM, the wastes may then be landfilled at a designated site. Facility should be operating in about 2 months.
Chemical Control Corp. 23 South Front Street Elizabeth, NJ (201) 351-5460	Incineration Neutralization Solvent Recovery	Various liquid and solid chemicals, acids, solvents, etc.
Marisol Inc. 125 Factory Lane Middlesex, NJ 08846 (201) 469-5100	Solvent Recovery	Liquid organic chemicals, cleaners, halogenated hydrocarbons, oil wastes for reclamation.
National Converters, Inc. 459 Chestnut Street Union, NJ 07083 (201) 964-1550	Solvent Recovery	Chlorinated solvents, acids, alkalis, and other chemicals.
Rollins Environmental Serv. Inc. P. O. Box 221 Bridgeport, NJ 08014 (609) 467-3100	Incineration Neutralization Chemical Treatment Recovery	Industrial chemical wastes, limited explosives, poisons, including: acids, caustics, chlorinated and non-chlorinated organics, plating and etchant solutions, paint sludges, pesticides, cyanide, scrubber effluents, etc.
Scientific Chemical Processing 216 Paterson Plank Road Carlstadt, NJ 07072 (201) 589-7777	Solvent Recovery	Solvents, paint, oils, chlorinated hydrocarbons, acids, bases, slurries etc.
Solvent Recovery Service of NJ Sylvan Street Linden, NJ 07036 (201) 925-8600	Solvent Recovery	Chemical wastes, solvents. Specialize in distillation for recovery of solvents.

NEW YORK

Company	*Type of Waste Accepted*
Chemical Waste Disposal Corporation 42-14 19th Avenue Astoria, New York 11105 (212) 274-3339	Recovery/distillation of chlorinated solvents, and related solvents.
Chem-Trol Pollution Services, Inc. P. O. Box 200 Model City, New York 14104 (716) 754-8231	Most types of chemical-related wastes including solvents/cleaners, halogenated hydrocarbons, paint & coating sludges, oils and oily waste, toxic acids, alkalis, plating/etching wastes, cyanides, heavy metal solutions & residues, pesticides/PCB's, carcinogens, sludges and solids, arsenic and mercury wastes.
Frontier Chemical Waste Process, Inc. 4626 Royal Avenue Niagra Falls, New York 14303 (716) 285-8200	Industrial by-products and wastes of both organic and inorganic composition and of spec. materials. Electroplating; metal-finishing waste of heavy metals (Cr, Ca, Ni, Zn, Cd, Hg, Sn, Sb, Pb, As, etc.), acids, bases, salts, cyanide, cyinate, carsenogenics, compounds, oil, paints, inks, heterocyclics and halogenated compounds.
Pollution Abatement Services 155 East Third Street Oswego, New York 13126 (315) 343-3356	Oil wastes, paint sludges, solvents/cleaners, still and tank bottoms, and generally any organic or aqueous liquid.
Recycling Laboratories 112 Harrison Place Syracuse, New York 13202 (315) 422-4311	Industrial solvents (chlorinated and non-chlorinated caustics and acids with heavy metals, oil, vinyl, polyesters and pigment sludges.

PENNSYLVANIA

Company	*Type of Waste Accepted*
Chemfix Corporation 2901 Banksville Road Pittsburgh, Pennsylvania (412) 343-8611	Heavy metals, Neutralizes pickle liquors, cyanides, sludges, liquid and semi-liquid waste sludges—Handles only non-organics.
Chemical Application Company 116 Water Street Beverly, Massachusetts 01915 (617) 927-1680	Acids, caustics, halogenated hydrocarbons, oil wastes, solvents/cleaners, still and tank bottoms.

Company	*Type of Waste Accepted*
Safety Projects and Engineering, Inc. 3 Malden Street West Quincy, Massachusetts (617) 471-1327	No available list.
Silresim Chemical Corporation 86 Tanner Street Lowell, Massachusetts 01852 (617) 459-7342	Oil waste, solvents.

MAINE

Company	*Type of Waste Accepted*
The Crago Company, Inc. P. O. Box 409 Gray, Maine 04039 (207) 657-4785	Acids, caustics, halogenated hydrocarbons, heavy metals in solution, oil waste, paint sludge, pesticides, sludge and tank bottoms.

AFFIDAVIT OF ROBERT MEAGHER.

(May 5, 1977.)

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

I, Robert Meagher, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the President of Scientific, Inc., Scotch Plains, New Jersey.

2. On March 21, 1977, I attended a meeting held in the office of Beatrice Tylutki, the Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection. Attending the meeting were Director Tylutki, Hank Jatczak, Deputy Director, Jack Van Dalen, Deputy Attorney General and Robert Meagher, the deponent herein, Gary A. Maham of Scientific, Mrs. Jerry Chafin, Vice President of Scientific, Richard Paluso, P. E. and Ted Schwartz, Esquire.

3. In part, the discussion centered around how leachate being generated at Kin Buc Landfill, Edison, New Jersey, was to be treated and disposed of. Director Tylutki emphatically stated that it could not be disposed of in New Jersey. She stated, "Take it to Pennsylvania."

ROBERT MEAGHER
Robert Meagher

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF NORMAN ROSENFARB.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, Norman Rosenfarb, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the Sales Representative of R & R Sanitation Company, Box 422, R. D. #4, Dover, New Jersey 07801.

2. R & R Sanitation Company hauls domestic and industrial waste collected within the State of New Jersey.

3. We dispose of wastes for M & M Candy Company which wastes are food processing wastes. These wastes were disposed through Ocean Disposal in Kearney, New Jersey, until their permit expired for ocean dumping. Next, those wastes were disposed of through the landfill facility at Kin Buc until that facility was closed.

4. Thereafter, these wastes were disposed of at Grows Landfill in Morrisville, Pennsylvania, and some other sites. Grows Landfill became unavailable for dumping for us in the first two weeks of April, 1977.

5. As a result of the unavailability of Grows Landfill in Pennsylvania, I telephoned Dr. Ron Buchanan at the Hazardous Waste Section of the Department of Environmental Protection and requested from him suggestions as to where we might continue disposing of the wastes which we had. I suggested at that time Ocean County Landfill in New Jersey or Southern Ocean County Landfill in New Jersey. Dr. Buchanan suggested Chrins in Easton, Pennsylvania, as a site for the dumping. Dr. Buchanan did not suggest any sites in the State of New Jersey for the disposal of these wastes. As I had never heard of Chrins, I contacted them with the result that we began disposing of wastes there which we continue to do to this date.

6. Subsequent to that telephone call, Dr. Buchanan and I spoke again on the telephone at which time he indicated that Ocean County Landfill and Southern Ocean County Landfill would not be appropriate sites for any of our disposal of wastes as there had been a meeting with Beatrice Tylutki, Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection, at which time it was decided that the policy of the Department would be that there would be no new streams of waste permitted at landfill sites in the State of New Jersey.

NORMAN ROSENFARB
Norman Rosenfarb

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF RONALD KILEY.
(May 6, 1977)

STATE OF NEW JERSEY
COUNTY OF PASSAIC } *ss.:*

Ronald Kiley, being sworn upon his oath, according to law, deposes and says:

1. I am Operations Manager for Gaess Environmental Services Co. at their Passaic plant, in Passaic, New Jersey.

2. I am responsible for dispatching our collection vehicles for servicing the disposal needs of industry in New Jersey.

3. Since the closing of the Kin-Buc landfill in Edison, New Jersey, Gaess Environmental Services Co. has been compelled to transport solid and liquid waste collected from New Jersey industries hereinafter named to disposal facilities in the State of Pennsylvania and New York State because there is no other available facility in New Jersey.

4. The following are some of the industries from which we haul solid and liquid waste to these disposal sites.

   Hoffman La Roche
   F. M. C. Corporation
   Union Carbide
   R. C. A.
   Stauffer Chemical
   Diamond Shamrock
   ICI United States
   Western Electric
   BASF Wyandotte

   There are at least twenty-five other companies of various sizes which we service.

5. These wastes are primarily chemical wastes.

RONALD KILEY
Ronald Kiley

Sworn to and Subscribed before me this 6th day of May, 1977.

PETER W. RADICE
Peter W. Radice
Notary Public of N. J.

PETER W. RADICE, JR.
Notary Public of New Jersey
My Commission Expires April 4, 1980

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625
BY: STEPHEN SKILLMAN
Assistant Attorney General
(609) 292-4965

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-82-74
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

AFFIDAVIT OF BEATRICE S. TYLUTKI.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

BEATRICE S. TYLUTKI, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the Director of the Solid Waste Administration, Department of Environmental Protection, State of New Jersey. I have read the Supplemental Memorandum and Affidavit filed in this matter on or about May 5, 1977, and I make this affidavit in response thereto.

2. The landfilling of all waste materials poses environmental problems, however, the dangers are greatest with regard to the disposal of chemicals, hazardous wastes and liquids. Because of grave environmental concern over the disposal of such wastes on land, the Department of Environmental Protection initiated action to close the Kin-Buc landfill by issuing an administrative order dated July 8, 1976. Previous thereto Kin-Buc had been the last commercial landfill in New Jersey to accept chemical wastes. Following the closure of Kin-Buc's chemical disposal operation, this office has spent months in negotiations with Kin-Buc concerning the adequate termination of the landfill and the disposal of leachate which is now being generated there.

3. In light of these efforts, the affidavit of Robert Meagher, President of Scientific, Inc., the parent company of the Kin-Buc landfill, is particularly disconcerting. Specifically, the meeting of March 21, 1977, referred to in the Meagher affidavit, was one of several on the topic of properly closing Kin-Buc. Among the alternatives discussed were transportation of the leachate to a treatment or processing facility either in New Jersey or out of state, on-site treatment of the leachate with or without discharge into the Raritan River, and pretreatment of the leachate with discharge into the Middlesex Sanitary Sewer. Kin-Buc has stalled repeatedly concerning the proper disposal of the leachate and has suggested that it be permitted to "recycle" the leachate through the landfill. I have rejected the recycling suggestion because it may permit much of the leachate to escape into ground or surface waters near the landfill.

4. Although I clearly recall offering Kin-Buc several New Jersey alternatives for leachate disposal at the March 21, 1977, meeting, as discussed above, I have no recollec-

tion of ever stating at that meeting, even as a facetious comment, that Kin-Buc should, "Take it to Pennsylvania." Kin-Buc should be well aware of the seriousness with which this office views the leachate problem at its landfill. Clearly, I would never suggest that the material should go to Pennsylvania, unless destined for a chemical treatment or processing facility that is capable of safely disposing of it.

5. Contrary to the overall point of the Supplemental Memorandum and affidavits, it is simply not true that New Jersey relies on Pennsylvania or any other state's landfills as part of its solid waste management planning. It is the clear policy of New Jersey to prohibit, to the fullest extent possible, the disposal of chemicals, hazardous wastes or liquids on land. Rather such wastes should be treated or processed at an appropriate facility, and only the residues from such facilities should be landfilled, and then only at specially designed final containment sites.

To the extent that certain generators or haulers use Pennsylvania landfills, they do so not as part of any New Jersey plan, but simply because of their own economic motivation. Although the disposal of chemicals at landfills in Pennsylvania is inconsistent with New Jersey's policy, there is no statutory or regulatory authority that permits the Department of Environmental Protection to protect its sister states from a practice that they have not sought to prohibit.

BEATRICE S. TYLUTKI
Beatrice S. Tylutki

Subscribed and sworn to before me,
this 16th day of May, 1977.

J. Mark McQuerrey
Atty. at Law

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625
BY: STEPHEN SKILLMAN
Assistant Attorney General
(609) 292-4965

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-82-74
Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

AFFIDAVIT OF RONALD J. BUCHANAN.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

RONALD J. BUCHANAN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by the State of New Jersey, Department of Environmental Protection, Solid Waste Administration, in the position of Chief, Bureau of Hazardous and Chemical Wastes. Accordingly, I am familiar with the disposal of "industrial wastes" in New Jersey. In addition I have read the Supplemental Memorandum and various affidavits filed in the above matter on or about May 5, 1977.

2. Initially it should be pointed out that the term "industrial wastes" as used in the Supplemental Memorandum and affidavits is misleading and inaccurate. The great majority of industrial wastes are permitted for disposal at many New Jersey landfills. It is only those wastes that are classified as chemical, hazardous or as bulk or semi-liquids that are singled out for special attention. Indeed there are some 63 commercial and non-commercial landfills in New Jersey that may dispose of ordinary industrial wastes.

3. In distinction to ordinary industrial wastes, the Department of Environmental Protection (hereinafter "DEP") does have a firm policy of prohibiting to the extent possible the disposal of chemical, hazardous or liquid wastes at landfills. Instead of land disposal, it is the position of the DEP that such wastes should be disposed of at treatment or processing facilities. Because of the special environmental hazards associated with the disposal of such wastes, the DEP believes that this is a policy that should be followed regardless of the destination of the waste.

4. In July of 1976, the DEP closed Kin-Buc, Inc., the last commercial landfill in the State that disposed of chemical, hazardous, or general liquid wastes (many landfills still accept liquid sewage sludge or septic waste, but this too is a practice that the DEP restricts as much as possible with the eventual goal of elimination). At that time the DEP was satisfied that there were sufficient processing, treatment, and interim storage facilities both in and near New Jersey to handle the wastes that had formerly gone to that landfill. In a number of instances, for example, nonhazardous bulk liquids have been permitted to be disposed of in one of the many landfills registered for industrial wastes after dewatering. In some cases

those wastes were stored pending the acquisition and installation of the necessary dewatering equipment.

5. With the closing of Kin-Buc the Solid Waste Administration prepared a list of alternate facilities within 500 miles of New Jersey which were capable of treating or processing chemical and hazardous wastes. This list included nine facilities in New Jersey and was revised in September of 1976 and again in April of 1977 to reflect additions and deletions. The basis for the list is a federal EPA publication which has also been revised from time to time. All of the facilities on the list are processing and treatment facilities, although some may operate landfills as a part of the treatment process for the disposal of residue sludge. The list is in keeping with our position that chemical and hazardous wastes, and bulk liquids should not go to landfills. The list attached to the affidavit of Wilber Henry is the September, 1976, version.

6. A number of inquiries were received after the Kin-Buc closing from both generators and haulers that had used the Kin-Buc site. In general, we chose to deal with the generators rather than the haulers since they have ultimate responsibility for their wastes. In some cases we were able to give permission for dewatered industrial sludges of a non chemical or hazardous nature to go to other landfills in New Jersey. In other situations we recommended treatment of the waste or dewatering prior to disposal. Generators were sent our list of alternate facilities, and also were advised that they might choose to store the waste and seek our approval to operate their own disposal facility.

7. It should be noted that the out of state waste ban does not apply to the treatment or processing facilities discussed above. Because of an express exemption in the

regulations, the out of state ban does not apply to chemical, hazardous or liquid wastes which are to be treated, processed or recovered other than by disposal on land. *See,* N. J. A. C. 7:1-4.2(d).

8. Regarding the American Cyanamid affidavit, it is the policy of the DEP, as reflected in the July 2, 1976, letter of Lino F. Pereira attached to the affidavit, that the American Cyanamid mercury waste should not be disposed of on land. Consistent with that policy, all of the facilities recommended to American Cyanamid are treatment or processing facilities, not landfills.

9. Regarding the affidavit of Norman Rosenfarb, a hauler of waste from the M & M Candy Company, apparently Mr. Rosenfarb had until recently been disposing of a bulk liquid from M & M at a landfill in New Jersey that was not licensed for such waste. Eventually, Mr. Rosenfarb inquired about a number of alternate New Jersey landfills. I reviewed the quantity of M & M's waste and suggested that the waste would be acceptable for disposal in a New Jersey landfill receiving industrial non-hazardous waste provided the sludge was first dewatered. Since Mr. Rosenfarb is only a waste hauler and lacks the necessary equipment, my dewatering suggestion was rejected. I also suggested the treatment or processing facilities on the previously discussed list. Mr. Rosenfarb would not accept that solution either, apparently because of increased disposal costs. Rather, Mr. Rosenfarb chose to dispose of the waste at the GROWS landfill in Pennsylvania. Later, when GROWS was no longer available to him, Mr. Rosenfarb called and asked if I had personal knowledge of any other landfills which may be available. I indicated that I knew of another landfill in Easton, Pennsylvania, and gave Mr. Rosenfarb the name of the landfill

and suggested that he seek the advise of the Pennsylvania Department of Environmental Resources about its use.

10. The affidavit of Frank J. Kuserck of Texaco, Inc., is misleading. Mr. Kuserck was advised by me that the Texaco waste would be acceptable at New Jersey landfills provided it was dewatered. Texaco chose not to dewater its waste because of economic considerations, but rather to take it to Pennsylvania for disposal. This occurred only after the company had stored the waste until there were only three days capacity left in the tank and then approached us with an "emergency". I put Mr. Kuserck in touch with Mr. George Buchanan of the Pennsylvania Department of Environmental Resources, and Pennsylvania apparently gave its permission for disposal of the waste at an artificially lined landfill in Pennsylvania.

11. The affidavit of Ronald Kiley of Gaess Environmental Services Company is also misleading. He states that Gaess has been "compelled" to transport New Jersey waste to the State of Pennsylvania and the State of New York because of lack of available facilities in New Jersey. I suspect that what makes them unavailable is simply economics. Mr. Kiley includes a list of nine New Jersey industries which he says are sending their wastes out of state. I am aware of at least 57 New Jersey industries which formerly used Kin-Buc for their chemical and hazardous and bulk liquid wastes, and which are still legally disposing of those wastes in New Jersey.

12. In summation it is clear that New Jersey does not rely on Pennsylvania or any other state as part of any "plan" for the disposal of certain wastes at landfills. Rather, New Jersey has prohibited the disposal of chemicals, hazardous wastes and liquids at its landfills and believes that this policy should be followed by neighboring

states. Such wastes should only be disposed of at treatment or processing facilities, facilities which are available to waste streams regardless of the state of origin, and not by dumping on the land. To the extent that certain New Jersey industries or haulers have selected out of state landfills for disposal, it is because of selfish economic motives and not because of any reliance by New Jersey waste disposal planning on those sites.

RONALD J. BUCHANAN
Ronald J. Buchanan

Subscribed and sworn to before me,
this 17th day of May, 1977.

J. Mark McQuerrey
Atty. at Law

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CITY OF PHILADELPHIA, et al.
Petitioners

v.

STATE OF NEW JERSEY, et al.
Respondents.

AFFIDAVIT OF VINCENT A. SUOZZI.

(July 6, 1977.)

STATE OF NEW YORK
COUNTY OF NASSAU } *ss.:*

VINCENT A. SUOZZI, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Mayor of the City of Glen Cove, New York, one of the above-named plaintiffs and have personal knowledge of the matter herein contained.

2. For the past 5 years Glen Cove has contracted with Jamaica Ash and Removal Company for collection and disposal of the solid waste generated within Glen Cove. This company has been disposing of this waste in New Jersey simply because there is no facility available on Long Island. All of the landfills operating around Glen Cove are municipally owned and operated for their exclusive use.

3. I have discussed this disposal problem with Mr. Fazzini, Vice President of Jamaica Ash and Removal Company and I am satisfied that closing of New Jersey to out-of-state waste will leave our collector without a source for disposal. As solid waste accumulates in Glen Cove, a serious health hazard is anticipated. There is no solace in knowing Glen Cove may have a contractual claim against the collector.

4. Three years ago we commenced work on a long-term solution to our solid waste problem. Glen Cove needed a new sewer plant and our plan was to incorporate as a second phase an incinerator for sludge that would also incinerate municipal solid waste. Environmental Protection Agency has approved the sewer plant and construction will actually start next month. The use of an incinerator for sludge and municipal waste is unique and because of this uniqueness we have received not only EPA approval but a federal commitment for funding. The engineering for this incinerator is complete. We are now negotiating with the State of New York for supplemental funding. Specifications are being prepared. It is anticipated that this incinerator will be in construction and operation in two to two and one-half years from now. For the time being, therefore, we are utterly dependent upon New Jersey.

VINCENT A. SUOZZI
Vincent A. Suozzi

Sworn to and Subscribed before me this 6th day of July, 1977.

V. ALLAN BAUSO
V. Allan Bauso
Attorney at Law
Admitted to Practice
in New York State

AFFIDAVIT OF RICHARD A. PELUSO.
(June 29, 1977)

STATE OF NEW JERSEY
COUNTY OF BERGEN } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Civil Engineering, majoring in Environmental Engineering and have completed course work toward a doctor's degree in said field.

3. I am Vice-President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. On January 16, 1974, January 31, 1974, November 25, 1975, and March 30, 1977, I executed affidavits filed in this action. These affidavits were subsequently filed in the Supreme Court of the United States in conjunction with plaintiffs then motion for a stay. The facts therein stated remain unchanged except to the extent they are supplemented by this affidavit. Copies of these affidavits are attached.

5. On behalf of plaintiffs who are engaged in private enterprise and others, I do extensive work with the Department of Environmental Protection. I am familiar with the Department of Environmental Protection public records. I have made inquiry in the Bureau of Solid Waste Management of the Department of Environmental Protection whether they had any records indicating the acreage of land in New Jersey suitable and available as potential sanitary landfill sites. I have been advised that no such survey has ever been made and that the Department

possesses no specific knowledge of the amount or location of land suitable and available for future sanitary landfill use in the state. The only census records this Department maintains concerning sanitary landfills are those existing and those in the application process. As an engineering specialist in engineering design of sanitary landfills, I have spent considerable time the last five years in New Jersey travelling the length and breadth of the state by air and by car. In my affidavit of November 25, 1975, I stated that there is extensive acreage in need of land reclamation that is suitable, from an environmental point of view, for sanitary landfills should the economic need for same arise. No affidavits opposing this viewpoint has ever been filed on the matter by the Bureau of Solid Waste Management of the Department of Environmental Protection. It is now well recognized that the many problems that can emanate from disposal of solid or liquid waste on land are controllable. The regulations of the New Jersey Department of Environmental Protection and Environmental Protection Agency reflect this. Sanitary landfills are being designed and operated that will avoid degradation of the environment and will avoid impairing public health.

6. The greatest cost factor in solid waste disposal today is hauling the refuse from the place of origination to the disposal facility. The time consumed in transporting is affected by mileage, road conditions, and traffic congestion.

7. Kinsley's Landfill in Gloucester County, New Jersey, one of the plaintiffs herein, is comprised of approximately 335 acres. Approximately 70 acres are currently in operation as a sanitary landfill. The environmental controls that have been designed for the entire landfill of approximately 335 acres are estimated to cost in excess of $1,000,000.00. From my observations, it is my opinion

that at least 75 percent of the volume going into this landfill comes from Philadelphia.

The Mount Holly Sanitary Landfill, located in the towns of Mount Holly, Easthampton, and Lumberton, Burlington County, New Jersey, is in the process of installing environmental controls which will also cost in the order of $1,000,000.00. Over 75 percent of the volume going into this landfill comes from Philadelphia.

8. The Parklands Reclamation Project located in Bordentown Township, County of Burlington, New Jersey, consists of approximately 90 acres and has recently received an approved registration with extensive environmental controls. The heavy equipment necessary for the operation of this landfill has an approximate cost value of $600,000.00.

9. The type of environmental controls that are incorporated into modern sanitary landfills and the problems they are designed to correct are:

(a) Gas venting systems—To disburse methane gas so it will not accumulate.

(b) Aeration devices and lagoons—To evaporate and minimize leachate problems.

(c) Impermeable liners—To protect underground aquifers from leachate contamination.

(d) Fencing—To control scattering of debris.

(e) Modern compaction equipment—To increase density of solid waste.

(f) Perimeter collecting drains—To handle surface runoffs for control of possible flooding.

(g) Spraying—Odor control.

(h) Spraying and extermination—For rodent control.

(i) Monitoring wells—To make certain leachate systems are working properly.

(j) Gas monitoring wells—To make certain that methane gas venting systems are functioning.

(k) Other physical and chemical treatment processes —For leachate treatment and disposal.

10. The commercial collection and use of methane gas for heating and power generation is now becoming practical and feasible.

11. Sanitary landfills properly designed and operated in accordance with regulations of the New Jersey Department of Environmental Protection, permit conversion of mined, worthless lands to beneficial uses, the most acceptable being recreational.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 29th day of June, 1977.

STEPHINI VOZZA
Stephini Vozza
Notary Public, State of New Jersey
Residing in Passaic County
My commission expires March 30, 1982

AFFIDAVIT OF RICHARD A. PELUSO.
(March 30, 1977)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. A sanitary landfill is recognized by authorities and knowledgeable experts in the field of solid waste management as an environmentally sound method of solid waste disposal and a vital tool for land reclamation. The United States Environmental Protection Agency, in its 1976 publication entitled "Decision-Makers Guide in Solid Waste Management (SW-500)", states on page 109, "Every community needs access to a sanitary landfill for environmentally safe disposal of its solid waste." The solid waste management rules of the Bureau of Solid Waste Management of New Jersey require the operation of sanitary landfills in an environmentally sound manner (N. J. A. C. 7:26-1 et seq.).

5. Sanitary landfills are developed in lifts of 12 feet. There is no limitation in the regulations of the Bureau of Solid Waste Management concerning the number of lifts. This depends entirely upon the design of the landfill. From my wide experience in designing and supervising landfills in New Jersey the average elevation is in excess

of 50 feet. Operating a sanitary landfill to a depth of 20 feet would not be typical. Consequently, Mr. Lind's statement in paragraph 2 of his affidavit that almost one square mile of landfill area has been used since 1974 is a gross exaggeration.

6. I was the consulting engineer for MAC Sanitary Landfill. Contrary to Mr. Lind's averment in paragraph 5, this landfill was *not* closed because "of environmentally (including odor problems) and aesthetic considerations." This landfill was closed simply because it had reached its capacity in accordance with the engineering design on file with the Department of Environmental Protection.

7. The sanitary landfill proposed for the abandoned Church Brick clay mines in Bordentown, Burlington County, referred to in paragraph 5 of the Lind affidavit, has been designed by the firm with which I am associated and I am fully familiar with it. As a result of many years of clay mining the land is presently useless. Without land reclamation through a sanitary landfill this acreage will forever lie fallow.

8. Upon information and belief the D. E. P. has never undertaken a survey of suitable and available landfill sites in New Jersey. It is common knowledge that there are many hundreds of acres of land in New Jersey that have been scarified in mining operations. The most sensible and environmentally sound manner of reclaiming this land is through sanitary landfills.

9. Mr. Lind, in paragraph 6 of his affidavit, asserts that landfills increase health hazards by generating leachate and methane gas, attracting rodents and causing fires. The solid waste management rules of the Bureau of Solid Waste Management which Mr. Lind is charged with the responsibility of enforcing, clearly and emphatically pro-

hibit the operation of sanitary landfills that permit leachate to escape into the underground acquifers or cause any of the health hazards that he has enumerated. The solid waste management rules mandate that there be no fires, provides for rodent control and the proper disbursement of methane gas. However, the commercial use of methane gas generated by landfills is practical and in use in various parts of the United States. In New Jersey, the Edgeboro disposal landfill uses its methane gas for commercial purposes.

10. Completed sanitary landfills have been used for many purposes. Recreational uses such as parks, playgrounds and golf courses have been most predominant, however, there are many instances of shopping centers, post offices, airports, etc. having been built on land reclaimed by sanitary landfills. The United States E. P. A. has documented these uses in many of its publications.

11. It is within the control of the Bureau of Solid Waste Management of the D. E. P. of the State of New Jersey to eliminate "bad" landfills that Mr. Lind alleges exist in New Jersey. Simply eliminating the disposal of out of state waste will not convert a "bad" landfill into a good one. Enforcement by the Bureau of Solid Waste Management of its rules will eliminate any "bad" landfills. New Jersey can then enjoy the benefits of land reclamation through sanitary landfilling.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 30th day of March, 1977.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

AFFIDAVIT OF RICHARD A. PELUSO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach,* 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.° This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

*Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

—

No.

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

—

AFFIDAVIT OF MARVIN MAHAN.

(July 6, 1977.)

—

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc., a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. Attached hereto is an affidavit filed with the Supreme Court of New Jersey and executed by me on November 25, 1975. All of the facts therein stated remain true except to the extent herein modified.

3. Kinsley's Landfill, Inc. and MAC Sanitary Landfill, Inc. are wholly owned subsidiaries of Scientific, Inc.

4. MAC Sanitary Landfill, Inc. having reached its designed capacity has been recently closed.

5. Kinsley's Landfill operates in Gloucester County, New Jersey. It owns approximately 335 acres, 65 of which are presently being used as a sanitary landfill under a certificate of registration approved by the New Jersey Department of Environmental Protection and a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

6. On July 11, 1976, the engineering design for use of the balance of the acreage as a sanitary landfill was filed with the Department of Environmental Protection. It is anticipated that in due course registration for this additional acreage will be received. This expansion is predicated upon a continued sale of landfill space to Pennsylvania disposers.

7. The life expectancy of the section presently being operated is 2½ years.

8. Over 80% of the volume of refuse annually disposed of at this facility originates in the Philadelphia area. This company has a contract with the City of Philadelphia and it also serves many private haulers from the Philadelphia area. This company has a gross annual income of about $1,500,000.00. The costs of operating this facility are geared to the continued sale of landfill space to the City of Philadelphia and the private out-of-state haulers. Not only could this company not continue operations absent out-of-state sale of landfill space but in closing will suffer large financial losses. There is not a sufficient market available in New Jersey which would be attracted to this

area to off-set the losses occasioned by the loss of revenues coming from the Pennsylvania buyers of landfill space.

MARVIN MAHAN
Marvin Mahan

Sworn and subscribed to before me this 6th day of July, 1977.

FLORENCE W. EDWARDS
Florence W. Edwards
A Notary Public of New Jersey
My Commission Expires May 29, 1981

AFFIDAVIT OF MARVIN MAHAN.

(November 25, 1975.)

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

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DOCKET No. A-82-74

September Term 1974

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Civil Action

—

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents.

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

———

Affidavit.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc. a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. MAC Sanitary Landfill, Inc. and Kinsley's Landfill, Inc. which operate sanitary landfill facilities in Gloucester County, New Jersey are wholly owned subsidiaries of Scientific, Inc.

3. MAC Sanitary Landfill, Inc. leases approximately 80 acres of land, of which approximately 36 acres are used for sanitary landfill purposes. Pursuant to engineering plans and designs heretofore filed with the New Jersey Department of Environmental Protection, it is anticipated at least 500,000 tons of solid waste can be disposed of at said sanitary landfill facility.

4. The site owned and operated by Kinsley's Landfill, Inc. is comprised of approximately 335 acres of land of which approximately 65 acres are presently used for sanitary landfill purposes. Preliminary elevation plans have been filed with the New Jersey Department of Environmental Protection for the entire remaining portion of the tract, and engineering plans and designs are in the process of being completed. It is presently anticipated that not less than 15,000,000 tons of solid waste can be disposed of at said landfill site.

5. In order for Kinsley's Landfill, Inc. to operate a sanitary landfill facility upon the aforesaid 65 acre tract,

it was required by the Department of Environmental Protection that certain environmental controls be provided for the site. Said evironmental controls cost approximately $500,000, almost all of which has been spent by Kinsley's.

6. At the time the aforesaid 335 acres were purchased for operation of a sanitary landfill by Kinsley's Landfill, Inc., and environmental controls were made upon the 65 acre portion of said tract, an agreement was reached with the City of Philadelphia for the disposal of solid waste originating in said City. The aforesaid 335 acre tract would not have been purchased and the environmental improvements thereto would not have been made in the absence of said agreement.

7. MAC and Kinsley presently have a contract with the City of Philadelphia for a minimum of 800,000 cubic yards (200,000 tons) and a maximum of 1,200,000 cubic yards (300,000 tons) which runs for 10 years and is of vital importance to the ability of MAC and Kinsley's to continue in operation.

8. In a study prepared for Gloucester County by Roy Weston, a consulting engineer, it was estimated that the total domestic solid waste generated in Gloucester County for the year 1975 would be 95,000 tons and that the projected domestic solid waste to be generated in said County during 1985 would be 150,000 tons.

9. There are presently 12 sanitary landfill facilities operating in Gloucester County, New Jersey.

10. Both the MAC and Kinsley landfills were planned and developed to handle primarily solid waste from Pennsylvania and the City of Philadelphia. At present, approximately 80 per cent of the total volume originates from either Pennsylvania or the City of Philadelphia. In the

event the out-of-state ban is enforced, it will be necessary to either close one or both of the landfills from lack of volume. In addition, it will be necessary to apply to the Public Utility Commission for a substantial increase to make up for the loss of revenue that will result from the exclusion of out-of-state refuse. Without such a rate increase, the landfill will not be able to operate.

MARVIN MAHAN
Marvin Mahan

Sworn to and Subscribed before me this 25th day of November, 1975.

ARTHUR MEISEL
Arthur Meisel
Atty. at Law of N. J.

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

—

No.

—

CITY OF PHILADELPHIA et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

—

AFFIDAVIT OF LEO F. HUGHES.

(July 6, 1977.)

—

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill Development Company operates a sanitary landfill in Burlington County New Jersey. It operates under a certificate of approved registration issued by New

Jersey Department of Environmental Protection (D. E. P.) and also has a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

3. The Landfill consists of 200 acres and is located in three municipalities, namely, Mount Holly, East Hampton and Lumberton Township.

4. Landfill Development Company commenced operations of the sanitary landfill at this site in 1969. For many years prior to this date, the City of Mount Holly operated a dump on this site and disposed thereon its municipal solid waste.

5. Many sections of this site, particularly the East Hampton section, had been used by the previous owners for sand and gravel mining.

6. In 1972, Landfill Development Company entered into a long term contract with the City of Philadelphia. Many private haulers from Philadelphia serving industrial and commercial establishments also used this landfill. The gross income from out-of-state users is in excess of $700,000.00 a year. Over 80% of the volume of refuse disposed at this landfill comes from the Philadelphia area.

7. This landfill also serves New Jersey communities as well as private haulers from New Jersey.

8. During the many years that Mount Holly operated the dump at this site there was no regulatory agency in New Jersey charged with protecting the environment. Consequently, many thousands of tons of waste of all descriptions were buried at this site during this period creating various environmental problems and health problems

primarily water pollution. The present operator, Landfill Development Company, has entered into an agreement with the New Jersey Department of Environmental Protection to upgrade this landfill in an effort to correct and eliminate the problems of the past. Landfill Development Company has committed itself to install environmental controls that will cost in excess of $1,000,000. Many of these controls are already installed. The controls are designed to eliminate aquifer contamination.

9. In addition to the costs of environmental controls, the economics of operating a landfill at this site requires the capital investment of $500,000.00 for heavy equipment, annual payroll in the neighborhood of $137,000.00 a year, maintenance and repairs of approximately $75,000.00 a year. There are many other costs of significance such as debt handling, insurance, engineering and engineering consultation, real estate taxes and the many other costs inherent in business operations of this size.

10. There is absolutely no way that this company can finance these necessary environmental controls and operate the landfill without the City of Philadelphia contract and the private Pennsylvania haulers. In relation to the overall costs of maintaining the site and operating under the conditions outlined above, the income received from New Jersey sources is so insignificant that this company would be forced to close the site. The section of Burlington County on which this site is located is relatively rural. There is no untaped potential market in New Jersey to make up for the loss of the sales of landfill space to Pennsylvania customers.

11. The life expectancy for this sanitary landfill at present annual volume is 20 to 25 years.

12. Department of Environmental Protection frequently inspects this landfill and recognizes it to be operated in an environmentally sound fashion.

LEO F. HUGHES
Leo F. Hughes

Sworn and subscribed to before me this 6th day of July, 1977.

ARTHUR MEISEL
Arthur Meisel
Att'y-at-Law of N. J.

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill and Development operates a sanitary landfill in Burlington County, N. J. and is so certified by the

Public Utility Commission and Department of Environmental Protection.

3. Approximately 75% of the volume of refuse disposed of at this site comes from the City of Philadelphia.

4. This landfill also serves several New Jersey communities as well as private haulers in New Jersey who serve industry and commerce located in this state.

5. The operation of this landfill in compliance with the Department of Environmental Protection regulations requires a large dollar volume of business. Without the benefit of the Philadelphia contract this sanitary landfill operation will not be economically feasible.

6. It is likely that Landfill and Development Company will be unable, for financial reasons, to continue operating a sanitary landfill facility in the event it loses the volume of solid waste generated by the City of Philadelphia.

LEO F. HUGHES, 3rd
Leo F. Hughes, 3rd

Sworn to and Subscribed before me this 18th day of November, 1975.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires March 16, 1977

AFFIDAVIT OF MILTON BERKES.

(January 29, 1974.)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN } *ss.:*

Milton Berkes being duly sworn upon his oath according to law deposes and says:

1) I am a Legislator from the 140th Assembly District of the Commonwealth of Pennsylvania elected from Bucks County.

2) I have personal knowledge of the matters contained herein.

3) I have, this twenty-ninth day of January, 1974, introduced into the House of Representatives of the Commonwealth of Pennsylvania a bill designated as House Bill No. 1831, a true copy of which is attached hereto and made a part hereof.

4) The intent of this legislation is to retaliate against any state that refuses to accept solid or liquid waste, for treatment or disposal, that originates within the Commonwealth of Pennsylvania.

MILTON BERKES
Milton Berkes

Sworn and subscribed to before me, a notary public of the Commonwealth of Pennsylvania this 29th day of January, 1974.

EUNICE F. JOHNSON
NOTARY PUBLIC
My Commission Expires Sept. 13, 1976
Hershey, Pa. Dauphin County

AN ACT

Amending the act of July 31, 1968 (P. L. 788, No. 241), entitled "An act providing for the planning and regulation of solid waste storage, collection, transportation, processing and disposal systems; requiring municipalities to submit plans for solid waste management systems in their jurisdiction; authorizing grants to municipalities; requiring permits for operating processing or disposal systems; imposing duties on and granting powers to municipalities; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies, prescribing penalties, and making an appropriation," prohibiting the treatment and disposal within the State of solid waste collected from a state that does not accept waste from this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6, act of July 31, 1968 (P. L. 788, No. 241), known as the "Pennsylvania Solid Waste Management Act," is amended by adding a clause to read:

Section 6. Powers and Duties of the Department.—The department shall have the power and its duty shall be to:

• • •

(10) Develop methods to identify the source of any solid waste which is part of the process of a solid waste management system to prevent any solid waste collected from another state that does not accept solid waste from this Commonwealth from being processed as part of such solid waste management system.

Section 2. Section 7 of the act is amended by adding a subsection to read:

Section 7. Applications and Permits.—• • •

(f. 1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 3. Section 9 of the act is amended by adding, before the last paragraph, a clause to read:

Section 9. Prohibited Acts.—It shall be unlawful for any person, municipality, county, or authority to:

• • •

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 4. This act shall take effect immediately.

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

SUPPLEMENTAL APPENDIX

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, et al.,
Appellants,

v.

STATE OF NEW JERSEY, et al.,
Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

Jurisdictional Statement Filed September 15, 1977.
Probable Jurisdiction Noted November 28, 1977.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS OF SUPPLEMENTAL APPENDIX.

	Page
Affidavit of Bernhardt V. Lind Dated March 15, 1977	SA 1
Affidavit of Lino F. Pereira Dated July 14, 1977	SA 9

AFFIDAVIT OF BERNHARDT V. LIND.

STATE OF NEW JERSEY }
COUNTY OF MERCER } *ss.:*

BERNHARDT V. LIND, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Acting Chief of the Bureau of Technical Services in the Office of Solid Waste Administration within the Department of Environmental Protection (hereinafter "DEP"). I am responsible for analyzing and managing the present and future solid waste disposal problems faced by the State of New Jersey. I have held this or a similar position in the Bureau of Solid Waste Management since March 1973.

2. Prior to the New Jersey statute banning the disposal of out-of-state waste in New Jersey solid waste facilities (January 1974), the records of the DEP indicate that 1.5 million tons per year of out-of-state waste was buried in New Jersey landfills, .85 million tons of which originated in Pennsylvania and .65 tons of which originated in New York. In calendar year 1974 (the first year P. L. 1973, c. 363 was to have been in effect) out-of-state waste dumping increased in volume to 2.4 million tons in New Jersey landfills, an increase of almost one million tons. Of the 2.4 million tons of waste, 1.7 million tons originated in Pennsylvania and .7 million tons originated in New York. In calendar year 1975 (the second year P. L. 1973, c. 363 was to have been in effect), out-of-state waste dumping reached 1.8 million tons in New Jersey landfills, 1.4 million tons originating in Pennsylvania and .4 tons originating in New York. Thus, between January 1974, the effective date of P. L. 1973, c. 363, and January 1976, 5.7 million tons of out-of-state solid waste was dumped in New Jersey. Viewed from the perspective of final disposition, 5.7 mil-

lion tons of solid waste deposited to a depth of 20 feet in a landfill operated in compliance with the regulations of DEP would occupy an area of 530 acres, which represents a depletion of almost one square mile of landfill area.

3. While the records of the Bureau of Solid Waste Administration show a decrease in total tonnage of in-state and out-of-state solid waste dumping in 1975 reflecting the economic recession that was experienced by the Northeast in that year, the out-of-state share of solid waste dumping in New Jersey is 20% of all New Jersey dumping, a figure which shows that the out-of-state share has doubled since 1971. Additionally, Philadelphia's contribution to New Jersey's solid waste load has continued to increase: an analysis of the solid waste dumping by the Philadelphia Department of Streets shows a 50% increase in its dumping from 1974 to 1975, from 33,000 tons/month to 50,000 tons/month. This increase is also reflected by the fact that Philadelphia dumped 12.4% of the total tonnage at the 13 New Jersey landfills it used in 1974 but in 1975 increased its share to 24.7% of the totals at these landfills.

4. Using the tonnage figures given by the landfills in their registration statements certified to DEP in 1975 as well as projections for a 12 month period based on tonnage figures given by the landfills for November and December 1976, it can be seen that the trend showing increased usage of New Jersey landfills by Philadelphia is presently continuing. For instance, Florence Landfill, which certified 46,676 tons (3973 tons/month) of waste deposited in 1975, is projected to have had 124,168 tons (10,347 tons/month) dumped in 1976, an approximately 3-fold increase; Big Hill Landfill (owned by Burlington Environmental Management Services, Inc.) increased from 18,696 tons (1558 tons/month) dumped in 1974 to 99,258 tons (8272 tons/month) in 1976, a 5-fold increase; Warner Company Landfill (now owned by Waste Resources, Inc.) increased from 275,000 tons (22,550 tons/month) in 1975 to 326,695 tons (27,391 tons/month) in 1976, a 16% increase; Mac Landfill and Kinsley Landfill (both owned by Scientific, Inc.) increased from a combined total of 491,118 tons (40,527 tons/month) in 1975 to 536,894 tons (44,741 tons/month) in 1976, a 9% increase; Buzby Brothers Landfill increased from 139,000 tons (11,587 tons/month) in 1975 to 179,000 (14,917 tons/month) a 23% increase; Ward Landfill increased from 131,250 tons (10,938 tons/month) to 290,535 tons (24,211 tons/month) a 2-fold increase; Amadei Landfill (owned by Gloucester Environmental Services, Inc.) increased from 352,700 tons (29,392 tons/month) in 1975 to 500,000 tons (41,741 tons/month) a 30% increase; Hawthorne, Inc. Landfill increased from 28,000 tons (2335 tons/month) in 1975 to 41,111 tons (3426 tons/month) in 1976, an increase of 32%; and Kramer Landfill increased from 129,936 tons (10,753 tons/month) in 1975 and 243,030 tons (20,252 tons/month) in 1976, a 2-fold increase. Only Q. T. Landfill and Development Company have had a decrease in loadings.

5. The figures above can only be viewed with extreme alarm. For as predicted in previous affidavits in this matter, expansions of old landfills (both legal and allegedly illegal) have occurred at the expense of scarce rural New Jersey acreage and at the expense of an increasingly precious rural environment, because the New Jersey landfills simply cannot keep pace with the increasing disposal volume burdening New Jersey while also conforming to public health and safety regulations. For instance, during 1976, plaintiff Fazzio Landfill was closed and during 1977, plaintiff Mac Sanitary Landfill was closed because of environmental (including odor problems) and aesthetic considerations; on the other hand, the loss of volume from these closures was picked up by other landfills like Kinsley

Landfill and Florence Landfill. Furthermore, applications have been received for new landfills in most of the New Jersey counties close to Philadelphia and will need to be approved because of the staggering increase in loadings at existing sites. For example, Interstate Waste Removal Co., Inc. plans a sanitary landfill in Bordentown, Burlington County, with a capacity of 2,150,000 tons of solid waste (there is citizen opposition to any approval because of the close proximity of this property to Bordentown High School); Waste Resources, Inc. has an application pending for a sanitary landfill in Voorhees Township, Camden County, with a capacity for 1,400,000 tons of solid waste and site size of 89 acres; John P. Fazzio Landfill, Inc. has applied for a sanitary landfill on a site adjacent to its now closed facility in Bellmawr Borough, Gloucester County: Florence Landfill has indicated a desire to expand an additional 60 acres; Q. T. Landfill in Salem County plans to expand to 998,000 ton capacity on 109 acres. Additionally, DEP investigators allege that the Florence Landfill is both dug deeper and stacked higher than its approved design elevations; that Fazzio Landfill is alleged to have been packed over its capacities and beyond its designated borders; that Buzby Brothers is operating beyond its approved capacity; that Amadei Landfill will close above the level earlier approved by DEP. Such illegal conditions are suspected at other landfills also and indicate that New Jersey landfills are growing out of control.

In summary, the additional pressures being put on New Jersey landfills is causing and will continue to cause expansion of and applications and approvals of new sanitary landfills unless Pennsylvania's dumping is controlled. And while it was once believed that solid waste could be used for land reclamation, examination of closed landfills reveal that their use for building purposes is not desirable due to the high cost of required piling and the high cost of

gas accumulation prevention measures. Thus, all lands used for landfills are a loss for future use—a fact of great alarm in a small state like New Jersey.

6. Further problems exist as a result of the need to open up and expand existing facilities beyond their design capacity. For example, due to the closing of Mac Landfill and Fazzio Landfill, a significantly increased volume of waste is being dumped at Big Hill Landfill. The subsurface geology of this landfill consists primarily of highly permeable sands which could allow dripping and dangerous leachate (a noxious and high polluted liquid often caused by landfills) as well as methane gases to percolate and flow through the earth's strata and into the important groundwater of the State. Furthermore, expanding existing landfills could lead to increased health hazards caused by rodents, fires and scavenger birds; landfills also, needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems. In fact, citizen complaints regarding noise and odors have been received by DEP regarding Big Hill Landfill and there are also indications that said landfill may be causing water pollution problems in the underlying Cohansey and Kirkwood aquifers. Thus, it can be concluded that the above potential environmental insults demand that New Jersey not perpetuate "bad" landfills and that the number of landfills be held to a minimum.

7. Based on the review of information available from the Pennsylvania Department of Environmental Resources (hereinafter "DER") and my conversations with Pennsylvania landfill operators, it is my opinion that there continues to be sufficient landfill capacity in Pennsylvania within a 50 mile radius of Center City Philadelphia to accommodate the amount of Pennsylvania solid waste currently being disposed of in New Jersey landfills. For

instance, five new additional landfills have received permits in 1976 (Coaldale Landfill, Boyertown Landfill, Higgins Township Landfill, South Coatesville Landfill and West Schukyll Council for Good Government Landfill) and Strasburg Landfill has begun site preparation. Accordingly, if out-of-state solid waste can no longer be disposed of in New Jersey, it would not be necessary for Philadelphia to allow its solid waste to pile up on its streets. In addition, at the time P. L. 1973, c. 393 was to have gone into effect the DER developed an emergency plan to handle Pennsylvania solid waste being disposed of in New Jersey. On information and belief that emergency plan included a "gentleman's agreement" with the landfills in the surrounding Pennsylvania counties to accommodate Philadelphia's solid waste. Furthermore, in an emergency situation, a sanitary landfill can be operational within 4 to 6 weeks from approval, depending upon the number and type of improvements which have to be made prior to commencing dumping operations. There is sufficient suitable land for sanitary landfill purposes in Pennsylvania within 50 miles of Center City Philadelphia on which sanitary landfills could be operated. See "A Plan for Solid Waste Management in Pennsylvania", Commonwealth of Pennsylvania, Department of Health (June 1970), a portion of which is attached to my affidavit of December 8, 1975 as Exhibit C submitted to the Court in Brief, Affidavit and Appendix in Opposition to Motion for Remand and Stay. I know of no reason why the environmental and engineering problems associated with the commencement and operation of the sanitary landfills would be any more difficult in Pennsylvania within a 50 mile radius of Philadelphia than they would be in New Jersey. Thus, any difficulties which may be encountered in accommodating Philadelphia's waste in these landfills would not be due to lack of physical capacity.

8. Furthermore, a transportation system is available to get the City of Philadelphia's waste to the Pennsylvania landfills. The City of Philadelphia has the vehicular capacity to dump the waste destined to New Jersey in Pennsylvania. Moreover, as I lived in Philadelphia for 25 years and am familiar with the road systems in Philadelphia and the surrounding counties of Philadelphia, it is my opinion that the existing highway system is adequate to enable Philadelphia to establish a regular and dependable collection system for disposal in existing Pennsylvania landfills within a 50 mile radius of Center City Philadelphia. Finally, Philadelphia's rail haul project seems to be getting underway after long delays; on information and belief, Philadelphia has recently hauled solid waste to a site in Lancaster, Pennsylvania.

9. While no areas are perfect for landfill operations, some are more suitable than others. One factor in making such a judgment would be subsurface soil composition. It should be noted that southern New Jersey is not a very suitable area for landfilling because the subsurface soil, with very few exceptions, consists of highly permeable sands which allow dangerous leachate to pour into the groundwaters of the area. The soils in the Philadelphia Metropolitan Region, on the other hand, are better suited for landfill purposes. See Exhibit C which is attached to my affidavit of December 8, 1975 submitted to the Court in Brief, Affidavit and Appendix in Opposition to Motion for Remand and Stay.

10. Pennsylvania has alternative means to dispose of its solid waste. For instance, incinerators can cut the solid waste load. However, Philadelphia has done nothing to upgrade additional incinerators so that disposal could be accomplished while meeting air pollution control standards.

11. At the present time, the only viable method of solid waste disposal that exists in New Jersey is through sanitary landfills. However, even though landfills are necessary, they are, at best, a necessary evil. It is only good sense and good government, then, to support the proposition that landfills should not be expanded nor new operations started. Thus, the forces causing expansions and new starts must be controlled; it is for this reason that P. L. 1973, c. 363 was passed by the Legislature of New Jersey. The subsequent history of alarming increases in additional landfill capacity only supports the wisdom of that piece of legislation.

/s/ BERNHARDT V. LIND
Bernhardt V. Lind

Sworn to before me this 15th day of March, 1977.

/s/ PETER J. HERZBERG
Peter J. Herzberg
Attorney at Law of the State
of New Jersey

AFFIDAVIT OF LINO F. PEREIRA.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LINO F. PEREIRA, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am Chief, Bureau of Planning, Design and Resource Recovery in the Solid Waste Administration of the Department of Environmental Protection of the State of New Jersey. I am presently responsible for evaluating the existing capacity and environmental impacts of New Jersey landfills, planning for future disposal facilities so as to insure that such landfills are compatible with New Jersey's environment and developing a State-wide plan for solid waste management. In the course of these duties, I review major new disposal sites and am conversant with the state of the art of technology in solid waste disposal. I hold a license as a Professional Engineer in the State of New Jersey and have been employed by the Solid Waste Administration or its predecessors for the past seven years.

2. On January 30, 1974, December 8, 1975, December 29, 1975 and March 15, 1977, Bernhardt V. Lind executed affidavits that were filed in this matter. The facts therein remain unchanged except to the extent that they are supplemented by this affidavit.

3. The increase in out-of-state dumping reflected in Lind's affidavit of March 15, 1977 continues to have a serious impact on New Jersey. The reason for this is straightforward: most pollution problems are directly related to the amount of solid waste deposited in a particular landfill. It is common practice for researchers to express the results of their leaching tests in terms of pounds leached per ton of solid waste. Therefore, each additional

ton of solid waste that New Jersey must suffer in its landfills will produce a corresponding increase in pollution.

4. With respect to the four sites listed as depositories of Philadelphia waste in David J. Damiano's affidavit of June 30, 1977, serious pollution problems exist which are exacerbated by the large amount of out-of-state waste dumped.

a. Big Hill Landfill—Southampton Township, New Jersey—55 acres. Big Hill Landfill, which was once a minor landfill operation situated in a former sand pit, has been transformed into a major disposal site for Philadelphia's waste at the cost of air and noise pollution, traffic congestion, unsightliness and various other disturbances to the residents of a nearby retirement community that was built when the landfill was a minor operation. Approximately 100 citizen letters and a petition bearing the signatures of approximately 1500 persons complaining of the above problems have been received by the Solid Waste Administration. These complaints were received subsequent to Big Hill's acceptance of Philadelphia solid waste. Furthermore, this landfill, which is in the environmentally-sensitive Pine Barrens, has been causing water pollution problems (high level of phenols and high level of chemical oxygen demand) in the Cohansey and Kirkwood aquifers which together constitute a prime potable water source in the area.

b. L & D Landfill—Mount Holly, New Jersey—190 acres. State laboratory analyses show that this landfill has contaminated the Mount Laurel-Wenonah aquifer, which is a major source of domestic supply for the surrounding community. These analyses show groundwater contamination reflecting levels of oxygen demand in the groundwater itself six to eight times that found in raw domestic sewage and fecal coliform levels too great to determine.

Because of this water pollution problem, the Solid Waste Administration has entered into a stipulation requiring the operator to cover the landfill with an impermeable plastic membrane so as to limit rainwater infiltration, and to take other pollution measures, such as operating atop a plastic barrier in order to collect leachate, pumping contaminated groundwater from the site and installing additional monitoring wells. The above methods are experimental and will not necessarily be corrective of the groundwater pollution problem. L & D has also had to provide water supply to nearby residential units because of the groundwater problem. Finally, this landfill was sued by Easthampton Township which sought closure of the facility because of alleged pollution.

c. Kramer Landfill—Mantua Township, New Jersey—88.5 acres. This landfill is located on sandy soil of the Mount Laurel-Wenonah aquifer and has had a leachate problem which State laboratory analysis has shown to have resulted in degradation of the ground and surface waters in the area. This problem threatens public water supply wells within a half mile of the site, and accordingly the landfill was ordered to close in April 1977 by the Solid Waste Administration. Prior to this, the Solid Waste Administration has taken against this landfill every type of administrative enforcement action within its power.

d. Kinsley Landfill—Deptford Township, New Jersey—67.3 acres. During 1973 this landfill was polluting streams near the site, and therefore the pollution problem was ordered corrected. Recently shallow, medium and deep wells within the Wenonah-Mount Laurel aquifer, a major potable water source, have shown contamination, and it appears probable that the Kinsley Landfill is responsible for such contamination. Furthermore, under its present permits, this landfill has less than two years of life

remaining, although it has a long-term contract with the City of Philadelphia.

5. In his affidavit of December 19, 1975, David J. Damiano maintains that existing landfill capacities in Pennsylvania have been fully committed. Subsequent to the filing of that affidavit, however, there were permits granted for a number of new landfill sites near the City of Philadelphia. (Letter dated November 8, 1976 of William C. Bucciarelli, Chief, Division of Solid Waste Management, Department of Environmental Protection, Commonwealth of Pennsylvania, a copy of which is attached hereto as "Exhibit A"). Furthermore, statements regarding commitment of landfill space mean nothing because any system which may exist in Pennsylvania for committing landfill space can be revised to accommodate Philadelphia waste. Additionally, existing facilities can be expanded and new facilities constructed.

6. In his affidavit of July 5, 1977, Bernard J. McHugh states that using available Pennsylvania landfill sites within 50 miles of Philadelphia is impractical due to hauling distances, traffic congestion and road configurations. A 1972 study by the Delaware Valley Regional Planning Commission analyzing direct and alternate routes to and from Philadelphia indicates that transportation to Pennsylvania sites is comparable to transportation to New Jersey sites. Additionally, the existing Pennsylvania landfills are not appreciably more distant from Philadelphia than the New Jersey landfills at which Philadelphia dumps its wastes. Consequently, Philadelphia should be able to continue its collection service without need for additional manpower or equipment.

7. An analysis of the truck size entering New Jersey landfills indicates that unlike most of the waste collected in

New Jersey, the waste collected in Philadelphia is hauled in large economical transfer vehicles. If Philadelphia were to utilize Pennsylvania sites rather than New Jersey sanitary landfills for the disposal of its solid waste, it is my opinion that the average cost of collection and disposal would not increase by more than 10 per cent.

8. In his affidavits of March 30, 1977 and June 29, 1977, Richard Peluso maintains that sanitary landfills may be used for land reclamation and that completed landfills have been utilized for post offices, shopping centers and airports. Such notions are archaic. Most lands with the potential for reclamation are either in swamp or sand and gravel pits, both of which are environmentally unsuitable areas for the placement of landfill materials. In fact, it is common engineering practice to remove all solid waste materials from a discontinued landfill prior to construction thereon. Landfills are a structurally unstable fill subject to differential settlement that may be hazardous. Additionally, landfills produce methane gas which can accumulate in explosive concentrations, either within or beneath any structure built on a landfill. Instances of destruction of property and loss of life have been recorded as a result of explosions related to landfill gases. Because of this, the Solid Waste Administration has allowed millions of cubic yards of solid waste to be excavated prior to construction at completed landfills and these transferred materials have further contributed to exhausting space in New Jersey landfills. For example, the only shopping center in New Jersey known to me to have been constructed on a former landfill initially required excavation of the solid waste. Furthermore, the only post office that I am aware of that was built in New Jersey on a completed landfill was beset by numerous problems by reason of its location. The landfill settled beneath the foundation, which was supported by

piles, creating a gaping pocket between the foundation and the solid waste. Hazardous methane gas collected in an explosive concentration within the pocket. The immediate problem was resolved through installation of a mechanical venting system which contributed to a construction cost overrun of over 100%.

9. Mr. Peluso's affidavit also implies that the Parklands Reclamation Project located in Bordentown Township, New Jersey will be open for Philadelphia waste disposal. However, this landfill located near Trenton, New Jersey is not to be a source for Philadelphia waste but is to replace two landfills in the Trenton area. This is substantiated in the design documents prepared by Wehren Engineering Corporation (a concern with which Mr. Peluso is associated) which state:

> "Solid waste management plans for the adjacent Philadelphia area are not applicable to this project since it is not the intention of Interstate (the owners of Parklands landfill) to accept wastes from out-of-state" (p. 27).

10. In his affidavit of July 6, 1977, Leo F. Hughes states that his landfill, Landfill Development Company, would have to close if P. L. 1973, c. 363 went into effect. It should be noted that Landfill Development Company has caused extreme pollution problems because of poor operational policies that have resulted in an alleged expenditure of $1 million in an effort to minimize these problems. Regardless, this facility still accepts great amounts of Philadelphia waste. Such waste and its manner of disposal have contributed to the pollution problems of the landfill. Mr. Hughes states that over 80% of the volume of waste disposed at his landfill comes from the Philadelphia area. If this landfill had been limited to the 20% of its waste originating in New Jersey, the pollution problem would be correspondingly less severe and its abatement would be greatly simplified.

11. In his affidavit of July 6, 1977, Vincent A. Suozzi states that Glen Cove, Long Island, New York must use New Jersey facilities to dispose of Glen Cove's solid wastes which must come all the way down to Middlesex County, New Jersey—a distance of approximately 75 miles. Surely, a landfill could have been found in New York State closer to Glen Cove. Furthermore, an interim landfill could have been established for use during the five-year period that Mayor Suozzi refers to in terms of developing a long-term solution for the City's disposal of solid wastes. Indeed, that option is still open to the City.

12. In his affidavit of July 6, 1977, Marvin Mahan states that more than 80% of the volume of refuse disposed of at his facility comes from the Philadelphia area. The operation of the landfill has produced many environmental problems. If the landfill had been limited to that 20% of waste originating in New Jersey, the pollution problems would have been correspondingly less severe and the abatement would have been greatly simplified. Mr. Mahan also refers to an application for expansion of the Kinsley Landfill which is before the Solid Waste Administration in conceptual form. The proposed expansion envisions a landfill 200 feet above surrounding elevation—a height which is equivalent to a 15 to 20-story building.

13. Sanitary landfills are a necessary evil but they produce substantial pollution levels. Leachate from presently existing landfills is typically 20-50 times as concentrated in pollutants as raw sewage. In fact, the total water pollution loadings from landfills in New Jersey are comparable to all of the pollution contained in New Jersey's sewage prior to treatment. Sanitary landfills have tra-

ditionally been the primary method of disposing of solid waste in New Jersey. Because of the environmental problems associated with landfills, I am convinced that better means of disposal exist. It is a responsibility of my office to promote the maximum development of resource recovery operations within the State.

14. Even a landfill designed to meet the most advanced state of the art is likely to encounter environmental problems. Thus, improvements at landfills do not seem to eliminate pollution but only to minimize and assist in healing. Even in this regard the efficacy of such measures remains to be established. For the most part, pollution is generally irreversible in the hands of man, but can only be undone by time and Nature's slow processes.

/s/ LINO F. PEREIRA
Lino F. Pereira

Sworn to and Subscribed before me this 14th day of July, 1977.

/s/ PETER J. HERZBERG
Peter J. Herzberg
An Attorney-at-Law of
the State of
New Jersey

Exhibit "A".

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Post Office Box 2063
Harrisburg, Pennsylvania 17120

November 8, 1976

Mr. Lee Pereira
Bureau of Solid Waste Management
Division of Water Resources
Department of Environmental Protection
Trenton, New Jersey 08625

Dear Mr. Pereira:

This is to confirm your telephone request of November 1, 1976, regarding update information on solid waste facilities in Pennsylvania within certain distances of Philadelphia.

The Strasburg Corporation Landfill is not operational but is doing some site preparation. There was no substantial change except reduction in remaining capacities regarding the following facilities from the information supplied previously to Mr. Bernhardt Lind: (a) Warner Landfill, (b) Francis Cloud Landfill, (c) Novak Landfill, (d) Western Berks Authority Landfill, (e) Pottstown Disposal Landfill, (f) Chrin's Landfill, (g) Berks Corporation Landfill, and (h) Lanchester Landfill.

We issued permits to the following new landfill sites in approximately the same area: (a) Coaldale Landfill, Rahn Township, Schuylkill County, permit issued 7/15/76, (b) Boyertown Landfill, Douglas Township, Montgomery County, permit issued 8/5/76, (c) Higgins Township Landfill, Higgins Township, Schuylkill County, permit issued

3/13/76, (d) South Coatesville Landfill, Chester County, permit issued 10/21/75, and (e) West Schuylkill Council for Good Government Landfill, Reilly Township, Schuylkill County, permit issued 5/25/76.

I would appreciate, if possible, additional information on the assessment rates per cubic yard and gallon of wastes New Jersey is contemplating or has in effect which you described to me very briefly. It sounds real good and perhaps is something Pennsylvania and other states should look into. It would be helpful if you have copies of acts, bills, rules and regulations, or any literature you could send me.

Thanks.

Sincerely,

BILL
William C. Bucciarelli, Chief
Division of Solid Waste Management

Supreme Court, U. S.
FILED
NOV 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

Motion to Dismiss 1

Preliminary Statement 2

Question Presented 3

Counter-Statement of the Case 3

ARGUMENT:

A. The Commerce Clause Of The United States Constitution does not prohibit a state from taking action to prevent the disposal within its boundaries of substances originating out of state which are harmful to public health and the environment 9

B. The Federal Resource Conservation and Recovery Act of 1976 Does Not Pre-Empt State Legislation Prohibiting The Disposal Within Its Boundaries Of Waste Originating Out Of State 22

Conclusion 31

CASES CITED:

Askew v. American Waterways Operators, Inc.
411 U.S. 346 (1975) 22

Clason v. State of Indiana,
306 U.S. 439 (1939) 14, 17, 19

Cloverleaf Butter Co. v. Patterson,
315 U.S. 148 (1942) 17

Colorado Anti-Discrimination Commission v. Continental Air Lines,
372 U.S. 714 (1963) 25, 28

TABLE OF CONTENTS

CASES CITED:

Evco v. Jones,
409 U.S. 91 (1972) 11

Florida Lime & Avocado Growers v. Paul,
373 U.S. 132 (1963) 17, 22

Hackensack Meadowlands v. Municipal Landfill Auth.,
68 N.J. 451, 348 A.2d 505 (1975) 2

Hood v. DuMond,
336 U.S. 525 (1949) 15, 17, 18

Huron Portland Cement Co. v. Detroit,
362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 13

Mintz v. Baldwin,
289 U.S. 346 (1933) 22

Parker v. Brown,
317 U.S. 341 (1942) 18

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 17, 18

Philadelphia v. New Jersey,
430 U.S. 141 (1977) 2

Philadelphia v. New Jersey,
73 N.J. 562, 376 A.2d 888 (1977) 2

Reid v. Colorado,
187 U.S. 137 (1902) 22

TABLE OF CONTENTS

CASES CITED:

Shaw v. Byram Township,
88 N.J. Super 598, 207 A.2d 570 (App. Div), certif. denied, 45 N.J. 35, 210 A.2d 780 (1965) 10

Sligh v. Kirkwood,
237 U.S. 52 (1915) 14

Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,
64 N.J. 190, 314 A.2d 65 (1974) 10

H.P. Welch Co. v. New Hampshire
306 U.S. 79 (1939) 25, 28

STATUTES CITED:

Laws of 1973, Chapter 363 ..... 2, 3, 9, 11

N.J.S.A. 13:1I-9 ..... 4, 22

N.J.S.A. 13:1I-10 ..... 4, 30

N.J.A.C. 7:1-4.2 12

Resource Conservation and Recovery Act of 1976, Public Law 94-580, 42 U.S.C. §6901, et seq 2, 22, 23, 24, 25, 26, 28, 29

Solid Waste Management Act (1970) 5, 8

28 U.S.C. §1257(2) 21

TABLE OF CONTENTS

RULES CITED:

Rule 16 (1) (b) 1

Rule 16 (3) 3

AUTHORITIES CITED:

Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management 4-8, 18-19

United States Constitution, cited, Article I, Section 8, Clause 3 ..... 3, 13

IN THE

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY
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MOTION TO DISMISS

Pursuant to *Rule* 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION

PRELIMINARY STATEMENT

This appeal is before the Court for the second time. On November 18, 1975, the Supreme Court of New Jersey issued its decision sustaining the constitutionality of New Jersey's statutory prohibition (L. 1973, c. 363) against the disposal within New Jersey of waste originating out of state. *Hackensack Meadowlands v. Municipal Landfill Auth.*, 68 N.J. 451, 348 A.2d 505 (App. 27-53). A notice of appeal and jurisdictional statement were filed by the appellants, and the State of New Jersey filed a motion to dismiss for lack of a substantial federal question. However, the Court noted probable jurisdiction on April 5, 1976. 425 U.S. 910. Oral argument was held on November 3, 1976, and on February 23, 1977 the Court remanded the matter to the Supreme Court of New Jersey for reconsideration in light of the then recently enacted Resource Conservation and Recovery Act of 1976. Pub. Law 94-580, 42 U.S.C. §6901, *et seq.* *Philadelphia v. New Jersey*, 430 U.S. 141 (1977) (App. 54-56). The appeal was reheard by the Supreme Court of New Jersey on May 10, 1977 on an accelerated basis and on June 20, 1977 that court issued its decision holding that the New Jersey legislation was not incompatible with the Resource Conservation and Recovery Act. *Philadelphia v. New Jersey*, 73 N.J. 562, 376 A.2d 888 (1977) (App. 57-69). A new notice of appeal and jurisdictional statement now have been filed.

The arguments for dismissal of this appeal for lack of a substantial federal question were appropriately set forth in the brief in support of the motion to dismiss the initial appeal. However, the State is mindful of the fact that the Court previously has noted probable jurisdiction and, after full briefing by both parties and oral argument, it remanded the matter to the Supreme Court

of New Jersey for consideration of a new issue without any suggestion that jurisdiction had been improvidently noted. Therefore, by letter dated September 26, 1977, the Attorney General of New Jersey advised the Clerk of the Court that the State did not desire to repeat the arguments contained in its previous motion to dismiss and that pursuant to *Rule* 16(3) it would expressly waive the right to file a new motion to dismiss. However, by letter dated October 17, 1977, the Clerk of the Court advised the Attorney General that the Court had requested a new response to be filed. Accordingly, the Attorney General submits herewith a motion to dismiss appropriate for reconsideration of the prior order noting probable jurisdiction.

QUESTIONS PRESENTED

1. Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide solid waste disposal facilities for its own residents also to provide such facilities for other states?

2. Did Congress in enacting the Resource Conservation and Recovery Act of 1976 intend to pre-empt state legislation prohibiting the disposal within its boundaries of waste originating out of state?

COUNTER-STATEMENT OF THE CASE

On January 2, 1974, the Governor of New Jersey signed into law chapter 363 of the Laws of 1973, which was to become effective on February 1, 1974 (App. at 70-71). This legislation contained an express finding that:

> ". . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal

of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9 App. at 78).

Based on this finding the New Jersey Legislature directed that:

"No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." N.J.S.A. 13:1I-10 (App. at 70-71).

The crisis in solid waste disposal in New Jersey leading to the enactment of the ban on the dumping of waste originating out of state was cogently described in a report submitted to the trial court, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management":

"Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating.

• • •

"There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered 'marginal.' Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.

• • •

"Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequently likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations

in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill 'sponge.'

"Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

* * *

"Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called 'aerobic.' The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

"As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present is methane. Methane is the 'natural gas' commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is

no oxygen present, it does not pose an explosive threat in the fill itself.

Methane is, however, much lighter than air and, therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

* * *

"In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

"It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban re-

gions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

"Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites," (Da37-44).*

The primary cause of any problems the City of Philadelphia may encounter in disposing of its waste within Pennsylvania is not the lack of facilities in that State but rather the exclusionary ordinances of surrounding communities in Pennsylvania. As stated by David Damaiano, Commissioner of Streets of Philadelphia:

> Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively empowered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever." (Pa152).**

* This notation refers to the appendix to the State's original brief filed with the Supreme Court of New Jersey, which was certified to the Court on February 9, 1976.

** This notation refers to the appendix to the appellants' application for stay.

ARGUMENT

The appellants have not presented any substantial federal question entitling them to appeal.

A. *The Commerce Clause Of The United States Constitution Does Not Prohibit A State From Taking Action To Prevent The Disposal Within Its Boundaries Of Substances Originating Out Of State Which Are Harmful To Public Health And The Environment.*

The question presented, simply stated, is whether a state may, consistent with the Commerce Clause, seek to deal with a solid waste disposal crisis of substantial proportions by prohibiting the dumping of waste originating outside the state.

The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 states:

> "The Legislature finds and determines that since the enactment of P.L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." (App. 70).

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

> "The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean*, 64 N.J. 190, 193, 314 A.2d 65 (1974).
>
> • • •
>
> "Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains and wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.
>
> • • •
>
> "Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw* v. *Byram Township*, 86 N.J. Super. 598, 602, 207 A.2d 570 (App. Div.), *certif. denied*, 45 N.J. 35, 210 A.2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:
>
> "• • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property*. Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites.'" (App. 33, 35, 46-47).

These findings must of course be accepted on appeal to the Court unless they lack a reasonable basis in the evidence. *Evco v. Jones*, 409 U.S. 91, 94 (1972).

The New Jersey Legislature responded to this solid waste crisis by enacting chapter 363, the operative section of which provides:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State" (App. 70-71).

Pursuant to his statutory responsibilities under chapter 363, the Commissioner of the New Jersey Department of Environmental Protection adopted rules and regulations, to become effective concurrently with the statute, which provided:

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

1. Garbage to be fed to swine in the State of New Jersey;

2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J.A.C. 7:1-4.2 (App. 76).

The combined effect of chapter 363 and the implementing regulation is to prohibit the transportation into New Jersey of waste for dumping in landfills or burning in incinerators, while permitting interstate transportation of waste intended for any productive use, such as resource recovery, energy recovery or reclamation.

The Supreme Court of New Jersey concluded that this limited restriction on the dumping or incineration of waste,

as an emergency measure to cope with the State's solid waste crisis, was not incompatible with the principles of economic union embodied in the Commerce Clause. It said:

> "We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 815, 4 L.Ed.2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power" (App. 47).

These conclusions are fully consistent with the leading Commerce Clause decisions of the Court.

The Commerce Clause of Art. 1, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." It is now well established that it not only provides an affirmative grant of authority to Congress but also, even in the absence of congressional action, precludes the states from interfering with interstate commerce. It is equally well established, however, that the Commerce Clause does not require the states to permit the importation of articles which are an inherent threat to

public health, safety and welfare and thus a matter of special concern in the exercise of the states' police powers. *Clason v. State of Indiana*, 306 U.S. 439, 442-443 (1939); *Sligh v. Kirkwood*, 237 U.S. 52 (1915). As the Court stated in *Sligh v. Kirkwood, supra:*

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. '*Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.*'"
>
> "*Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . .*" 237 U.S. at 60 (citations omitted) (Emphasis added.)

This principle was applied in *Clason v. Indiana, supra*, where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. The Court, relying on *Sligh*, recognized that the statute was "a sanitary and health measure *not intended to cause discrimination against or to burden interstate commerce* . . ." 306 U.S. at 443 (emphasis added). The Court clearly stated:

> "Here, contrary to what seems to be the insistence of counsel, *the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.*
>
> "We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.
>
> "There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-4 (Emphasis added).

The Commerce Clause thus does not impair state authority to deal with threats to public health, safety and welfare. Rather, the intent of the Commerce Clause was to prevent economic balkanization of the states, such as by the enactment of legislation designed to further the economic interests of a state's own residents at the expense of others. This point was cogently stated by Justice Jackson in *Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949):

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

Measured by these principles, it is clear that chapter 363 does not offend the Commerce Clause because it is properly designed to protect the public health, safety and welfare of the residents of this State rather than to serve any local economic advantage. It is clear, as indicated in the opinion of the Supreme Court of New Jersey, that there is an acute shortage of available landfill space within New Jersey. This means that New Jersey faces the threat of not being able to dispose of the wastes generated within its own boundaries unless it can find new areas for disposal. It is also clear that the disposal of waste does present a serious threat to public health, safety and welfare. It pollutes water by the runoff of leachate, it generates gases which not only can be dangerous to breathe but also create fire hazards, and it severely limits the potential future use of property on which landfills are located. Finally, it is clear that New Jersey's solid waste problems, serious in any event, have been significantly aggravated by the disposal at New Jersey landfill sites of waste from outside the state. The record before the Court shows that when this case was first before the Supreme Court of New Jersey 8% of all waste disposed in New Jersey originated out of state (App. 35) and this percentage has grown to 20% during the pendency of the litigation. Thus, chapter 363 serves a clear public health, safety and welfare interest by reducing the overall quantity of waste which the State must dispose or incinerate,

and it is as fully compatible with the Commerce Clause as was the exclusion in *Clason* v. *Indiana* of animal carcasses not intended for consumption as food.

It is also clear that there is no element of economic discrimination in the exclusion from New Jersey of waste originating out of state. No New Jersey commercial interests stand to gain an advantage from this ban over competitors from outside the state. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests but rather that, in order to protect the health, safety and welfare of the citizenry at large, it has denied a small group of its entrepeneurs an economic opportunity to traffic in waste.

The appellants rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania v. West Virginia*, "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Therefore, these cases involved, under the analysis contained in *Hood & Sons v. DuMond*, *supra*, state regulation ". . . to constrict the flow of . . . commerce for their economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533. The restrictions were therefore naturally found to offend the Commerce Clause.

In short, Commerce Clause cases are concerned with the loss of products or resources to the chain of commerce. This is true whether the product or resource is avocados, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), butter, *Cloverleaf Butter Co. v. Patterson*, 315

U.S. 148 (1942), milk, *Hood & Sons v. DuMond, supra,* raisins, *Parker v. Brown,* 317 U.S. 341 (1942), or natural gas, *Pennsylvania v. West Virginia, supra.* In the present case, on the other hand, chapter 363 was not designed nor does it have the effect of furthering New Jersey commercial interests. Rather, its objective was to protect the citizens of the State from the direct threats to the public health and the environment noted by the Supreme Court of New Jersey.

In arguing that this case is not controlled by the decisions of the Court holding that the Commerce Clause is not violated by state legislation directed towards the protection of the State's health, safety and welfare, the appellants now urge, notwithstanding the record which was before the Supreme Court of New Jersey, that the disposal of waste really involves no threat to the health or welfare of New Jersey's residents. However, appellants presented no substantial material to the state courts to cast any doubt on the prevailing view that landfills do present serious health and environmental problems. In fact, the only material on this subject submitted to the trial court on the cross motions for summary judgment was a lengthy document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management." This report stated *inter alia:*

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating." (Pa37).

After discussing in greater detail the environmental and health problems in solid waste disposal, the document concludes with a two-page bibliography of pertinent literature dealing with solid waste problems (Pa47 to Pa48). There was therefore an abundance of material before the Supreme Court of New Jersey dealing with the environmental and health problems posed by waste disposal, on which it appropriately relied in its opinion.

Apparently recognizing that the record simply does not support their claim that this case falls outside the *Clason v. Indiana* line of cases, appellants also argue that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied the appellants due process of law. This contention is frivolous. It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment " . . . only upon the issues of federal pre-emption and discrimination against interstate commerce . . . " (App. 134). Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact on environmental degradation, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On appeal, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious ques-

tion was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. However, the Supreme Court of New Jersey rejected the appellants' thesis, finding that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions . . ." (App. 50), and it therefore rejected appellants' claim that chapter 363 was inconsistent with the Commerce Clause. It was then for the first time on a motion for remand to the trial court that appellants raised questions concerning the findings of the New Jersey Legislature and the Supreme Court of New Jersey as to the deleterious impact on the environment of the dumping of out-of-state wastes in New Jersey (App. 149-151). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand to the trial court ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 154). Therefore, assuming that any facts remained to be heard, which the State denied, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice. It is therefore surprising, to say the least, to find appellants claiming that this disposition by the state courts denied them due process of law. Appellants' explanation for this strange procedural posture is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not in their strategic best interests to continue with state court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been

denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited to final judgments under 28 U.S.C. §1257(2). Therefore, if there were any substance to appellants' argument, 28 U.S.C. 1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The appellants' due process argument is therefore plainly frivolous.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare . . ." (App. 62). If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. However, in the procedural posture in which appellants have placed this matter before the Court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all

wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9. Accordingly, the court properly found chapter 363 to be consistent with the Commerce Clause.

B. *The Federal Resource Conservation And Recovery Act of 1976 Does Not Pre-Empt State Legislation Prohibiting The Disposal Within Its Boundaries Of Waste Originating Out Of State.*

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests (*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960)); or to protect public health. *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Reid v. Colorado*, 187 U.S. 137, 147-149 (1902). Therefore, the plaintiffs must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.*, (hereinafter "the Act") pre-empts New Jersey's statute prohibiting the disposal of waste originating out of state.

The plaintiffs have failed to satisfy that burden, because they have not shown that the Act on its face in any way undermines the validity of New Jersey's prohibition against the disposal within the State of waste originating out of state. On the contrary, the only sense in which the Act bears on this case is that it contains express congressional recognition of the principal premises on which defense of the validity of the New Jersey statute rests.

First, the Act contains an express congressional recognition of the fact that solid waste disposal is not a subject of ordinary commercial dealings controlled by the free market principles of the Commerce Clause but rather a subject which directly affects the environment and public health. Thus, section 1002(b) (42 U.S.C. §6901(b)) states that:

> "ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—
>
> "(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
>
> "(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
>
> "(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;
>
> "(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

"(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

"(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken; . . . ."

Secondly, the Act constitutes an express congressional recognition that the problems of solid waste disposal are primarily of state and local, not national, concern. Thus, section 1002(a)(4) (42 U.S.C. §6901(a)(4)) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies . . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

"In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level." 122 Cong. Rec. 11069 (remarks of Senator Randolph).

The one area in which the Act has imposed a direct regulatory responsibility upon the federal government is with respect to hazardous waste. The Administrator of EPA has the responsibility under section 3001 (42 U.S.C. §6921) for identifying the characteristics of hazardous waste and listing particular hazardous wastes not later than eighteen months after enactment of the Act. The

Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. Section 3002-3005 (42 U.S.C. §6922-6925).

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of waste originating out-of-state and only a limited potential long range impact. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of EPA of a list of hazardous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months within which to promulgate such lists and regulations, the federal regulation of this area probably will not become operative at all for at least six months. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 723-724 (1963); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939).

Secondly, and even more importantly, when the federal regulatory program becomes operative, it will be limited to "hazardous wastes." This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and

radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2d Sess. 3 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated stored, transported, or disposed of, or otherwise managed." Section 1004(5) (42 U.S.C. §6903(5)).

It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under section 3001-3011 (42 U.S.C. §6921-§6931) of the Act. This conclusion is confirmed by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2d Sess., 16 (1976). Since the New Jersey statute as limited by its implementing regulations is primarily directed towards general municipal waste and the plaintiffs apparently are engaged solely in the disposal of such waste, the federal regulation of "hazardous waste" would have no effect on the subject matter of the instant appeal.

In addition to providing for direct federal regulation of "hazardous waste," the Act also establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. Although the exact future scope of federally supervised regional solid waste planning by state and local agencies, like the direct federal regulation of hazardous wastes, cannot be forecast with any assurance, it clearly has no immediate impact upon the New Jersey prohibition against the disposal of waste originating out of state. The regional planning provisions of the Act are not self-implementing but rather will become operative only after administrative action at both federal and state levels. The Administrator of EPA has 180 days after enactment of the Act to publish guidelines for identifying regional solid waste planning areas, and thereafter the governors of the states have two further 180 day periods for identifying the boundaries of regional planning areas and the agencies to carry out such planning; there is thus an overall period of nearly eighteen months before regional planning areas and implementing agencies even will be identified. Although the Act sets no deadline for the actual submission of regional plans, it must be assumed that some additional period will be required for this purpose beyond the eighteen months allowed for identifying planning regions and implementing agencies. Thus, since it will be several years before regional plans under the Act become operative, these sections of the Act can have no immediate impact upon the enforcement of chapter 363.

Furthermore, there is no substantial basis for concluding that chapter 363 will be incompatible with the solid waste planning provisions of the Act even when they become fully operational. First, it should be noted that the only way there could be a conflict between the

New Jersey statute and a regional plan under the Act is if the plans of New Jersey and its neighboring states include "interstate regions" pursuant to section 4006(c) (42 U.S.C. §6946(c)). Therefore, it is purely conjectural at this point whether the occasion will arise even for discussions for interstate regional planning areas. And, as previously noted, the mere possibility of conflicting regulatory action by a federal agency at some future date does not invalidate state legislation. *Colorado Anti-Discrimination Commission v. Continental Air Lines, supra; H. P. Welch Co. v. New Hampshire, supra.*

Secondly, it is clear that the planning provisions of the Act are intended to be voluntary, with the loss of federal financial assistance being the only consequence of a state's failure to participate in the federal program. The voluntary nature of the planning provisions of the Act is clearly evident in the specific section of the Act dealing with "interstate" regions, which specifically states that the establishment of such "interstate" regions shall be by "agreement" of the respective governors. Furthermore, there is no provision in the Act for the Administrator imposing an interstate plan in the event the governors fail to agree. Therefore, the sole possible consequence of the governors' failing to come to an agreement would be the loss of federal financial assistance in accordance with the terms of section 4007 (42 U.S.C. §6947(b)) of the Act.

The intent of Congress to make regional planning voluntary is confirmed by the numerous statements in the legislative history that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans." S. Rep. No. 94-988, 94th Cong., 2d Sess., 11 (1976). This point is stated with particular clarity in the Report of the House Commerce Committee:

"It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.

"Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

Therefore, even if the guidelines promulgated by the Administrator under section 4002(a) (42 U.S.C. §6942(a)) suggested the appropriateness of an interstate region encompassing New Jersey, the Governor of New Jersey still would have the option whether to agree to such a plan.

In any event, even if the Act could be read to impose a mandatory obligation upon the respective states to participate in regional planning, chapter 363 would not stand as an obstacle to compliance with that provision. Chapter 363 does not by its terms preclude the Governor of New Jersey from conferring with the governor of a sister state regarding regional solid waste planning. And if the procedures of the Act eventually were to result in an agreement between the governors of the respective states which was inconsistent with a total ban on the disposal in New

Jersey of out-of-state waste, this could be easily implemented through a further exercise by the Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." *N.J.S.A.* 13:1I-10.

Therefore, as also concluded by the Solicitor General of the United States in his Memorandum on the Application for Stay of Judgment Pending Appeal, the enactment of the Resource Conservation and Recovery Act of 1976 does not pre-empt or in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy, but instead the discharge by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	3
STATUTE INVOLVED	4
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	26
ARGUMENT	28
A. The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause	28
B. P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce	33
C. A State Statute That Prohibits Persons From Bringing Solid and Liquid Waste Into a State Is in Conflict With a Federal Statute That (a) Requires Cooperation in the Establishment of Solid Waste Management Plans for Interstate Regions, and (b) Provides for the Issuance of Federal Permits to Owners and Operators of Hazardous Waste Treatment, Storage or Disposal Facilities	59
Hazardous Waste Management	61
Interstate Solid Waste Management	65
D. Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim	68
CONCLUSION	76

TABLE OF CITATIONS.

Cases:	Page
Alexandria Scrap Corporation v. Hughes, 391 F. Supp. 46 (Md. 1975), rev. 426 U. S. 794 (1976)	31
Asbell v. Kansas, 209 U. S. 251 (1908)	35
Baldwin v. G. A. F. Seelig, 294 U. S. 511 (1935)	44
Best & Co. v. Maxwell, 311 U. S. 454 (1940)	35, 40
Bourjois, Inc. v. Chapman, 301 U. S. 183 (1937)	34
Brimmer v. Rebman, 138 U. S. 78 (1891)	37
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (1930)	74
Cities Service Co. v. Peerless Co., 340 U. S. 179 (1950)	34
City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W. D. Tex. 1966), aff'd 385 U. S. 35 (1966)	44
City of Burbank v. Lockheed Air Terminal, 411 U. S. 624 (1973)	68
City of Philadelphia v. State Dept. of Environ. Protec., 73 N. J. 562 (1977)	2
City of Philadelphia v. State, 376 A. 2d 888 (N. J. Sup. Ct. 1977)	2
Colorado Comm'n v. Continental, 372 U. S. 714 (1963)	68
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282 (1921)	26
Dean Milk Co. v. Madison, 340 U. S. 349 (1951)	34, 35
Douglas v. Seacoast Products, Inc., 431 U. S. 265 (1977)	41, 62, 63
Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266 (1933)	28
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 110 (1928)	28, 32
FPC v. Florida Power & Light Co., 404 U. S. 453 (1972)	28
Gibbons v. Ogden, 22 U. S. 1 (1824)	62
Grannis v. Ordean, 234 U. S. 385 (1914)	73
Great A. & P. Tea Co. v. Cottrell, 424 U. S. 366 (1976)	34
Hackensack Meadowlands v. Mun. Landfill Auth., 127 N. J. Super. 160 (Ch. 1974), rev. 68 N. J. 451 (1975), prob. juris noted 425 U. S. 910 (1976), remanded *sub nom.* Philadelphia v. New Jersey, — U. S. — (1977)	passim

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
Head v. New Mexico Board, 374 U. S. 424 (1963)	40
Hines v. Davidowitz, 312 U. S. 52 (1940)	60
Horn v. Community Refuse Disposal, Inc., 186 Neb. 43, 180 N. W. 2d 691 (Sup. Ct. 1970)	56
H. P. Hood & Sons, Inc. v. Dumond, 336 U. S. 525 (1949)	41
Hunt v. Washington State Apple Advertising Commission, — U. S. — (1977)	35, 45
Huron Cement Co. v. Detroit, 362 U. S. 440 (1960)	40, 41, 63
Jones v. Rath Packing Co., 430 U. S. 519 (1977), reh. den. 431 U. S. 265 (1977)	59, 60, 68
Judson v. Peoples Bank & Trust Co. of Westfield, 17 N. J. 57 (1954)	69
Mascaro & Sons, Inc. v. O'Hara, Inc., — F. 2d — (3 Cir. 1977), 1977-2 Trade Cases, ¶ 61,727	30, 42
Minnesota v. Barber, 136 U. S. 313 (1890)	38
Mullane v. Central Hanover Tr. Co., 339 U. S. 306 (1950)	73
Myers v. City of Hagerstown, 214 Md. 312, 135 A. 2d 147 (Ct. App. 1957)	56
Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229 (1911)	43
Oreg.-Washington Co. v. Washington, 270 U. S. 87 (1926)	38, 39
Penna. v. West Virgina, 262 U. S. 553 (1923)	43
Perez v. Campbell, 402 U. S. 637 (1971)	60, 67
Philadelphia v. New Jersey, — U. S. — (1977), on remand 73 N. J. 562 (1977)	passim
Pike v. Bruce Church, Inc., 397 U. S. 137 (1970)	35
Pipe Line Cases, 234 U. S. 548 (1914)	28
Plumley v. Massachusetts, 155 U. S. 461 (1894)	34, 37
Polar Ice Cream & Creamery Co. v. Andrews, 375 U. S. 361 (1964)	44
Public Utilities Comm. v. Landon, 249 U. S. 236 (1919)	28
Railroad Co. v. Husen, 95 U. S. 465 (1877)	36, 37, 38, 39, 40
Rasmussen v. Idaho, 181 U. S. 198 (1901)	38, 39
Rearick v. Pennsylvania, 203 U. S. 507 (1906)	28

Cases (Continued): Page

Rhodes v. Houston, 202 F. Supp. 624 (D. Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert.* den. 372 U. S. 909 (1963), 383 U. S. 971 (1966) 74
Rocchi v. Zoning Bd. of App. of Town of Glastonbury, 157 Conn. 106, 248 A. 2d 922 (Sup. Ct. 1968) 56
Savage v. Jones, 225 U. S. 501 (1912) 34
Schollenberger v. Pennsylvania, 131 U. S. 1 (1898) 34
Scott v. Donald, 165 U. S. 58 (1897) 38
Shafer v. Farmers Grain Co., 268 U. S. 189 (1925) 28
Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945) 34
Telegraph Co. v. Texas, 105 U. S. 460 (1882) 28
Thornton v. United States, 271 U. S. 414 (1926) 28
United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E. D. Pa. 1965), aff'd 357 F. 2d 806 (3rd Cir. 1966), cert. den. 384 U. S. 961 (1966) 29, 30
U. S. v. Underwriters Assn, 322 U. S. 533 (1944) 28
Wood v. Town of Wilton, 156 Conn. 304, 240 A. 2d 904 (Sup. Ct. 1968) 56

Statutes:

United States

15 U. S. C. § 1 29
28 U. S. C. § 1257(2) 3
28 U. S. C. § 1257(3) 3
42 U. S. C. § 3251 23
42 U. S. C. § 6901 ..... 23, 54, 55
42 U. S. C. § 6922 62
42 U. S. C. § 6923 ..... 61, 62
42 U. S. C. § 6924 ..... 61, 62
42 U. S. C. § 6925 ..... 61, 62
42 U. S. C. § 6926 61
42 U. S. C. § 6929 ..... 61, 62

Statutes (Continued): Page

United States (Continued)

42 U. S. C. § 6942(a) 65
42 U. S. C. § 6944 ..... 45, 54
42 U. S. C. § 6946(c)(1) 65
42 U. S. C. § 6946(c)(2) 65
42 U. S. C. § 6972(a) 66

New Jersey

N. J. S. A. 13:1D-7a 47
N. J. S. A. 13:1D-15 47
N. J. S. A. 13:1E-1 31
N. J. S. A. 13:1E-2c 32
N. J. S. A. 13:1E-38 63
N. J. S. A. 13:1E-42 63
N. J. S. A. 13:1E-66 47
N. J. S. A. 13:1I-1 et seq. 45
N. J. S. A. 13:1I-4a 46
N. J. S. A. 26:1A-7 46
N. J. S. A. 32:22B-1 ..... 8, 67
N. J. S. A. 32:27-1, et seq. 66
N. J. S. A. 48:2-13 31
N. J. S. A. 48:2-23 53
N. J. S. A. 48:13A-1, et seq. 31
P. L. 1973, c. 363 ..... passim

Connecticut

C. G. S. A. § 16-339 ..... 8, 67

Pennsylvania

35 P. S. § 6007 44
73 P. S. § 701 66

New York

McK Unconsol. Laws § 830 ..... 8, 67

TABLE OF CITATIONS (Continued).

Constitutional Provisions: Page

U. S. Constitution

Article 1, Sec. 8, cl. 3 ..... 18, 19, 20
Fifth Amendment 73, 76
Tenth Amendment 34
Fourteenth Amendment 73, 76

Administrative Regulations:

United States

40 CFR § 255 66
40 CFR § 255.10 66
40 CFR § 255.10(a) 66
40 CFR § 255.20 66
40 CFR § 255.24 66
40 CFR § 255.24(c) 66

New Jersey

N. J. A. C. 7:1-4 15
N. J. A. C. 7:1-4.2 15
N. J. A. C. 7:26-1, et seq. (proposed) 18, 31, 48
N. J. A. C. 7:26-1.4.23 58
N. J. A. C. 7:26-1.4.54 57
N. J. A. C. 7:26-2.1.1 ..... 49, 58
N. J. A. C. 7:26-2.1.2 48
N. J. A. C. 7:26-2.2.2 49
N. J. A. C. 7:26-2.2.3 49
N. J. A. C. 7:26-2.4 49
N. J. A. C. 7:26-2.5.4 49
N. J. A. C. 7:26-2.5.6 51
N. J. A. C. 7:26-2.5.7 51
N. J. A. C. 7:26-2.5.8 51
N. J. A. C. 7:26-2.5.12 51
N. J. A. C. 7:26-2.5.21 50
N. J. A. C. 7:26-2.5.22 50
N. J. A. C. 7:26-2.11.1 53

TABLE OF CITATIONS (Continued).

Administrative Regulations (Continued): Page

New Jersey (Continued)

N. J. A. C. 7:26-2.11.2 53
N. J. A. C. 7:26-2.11.3 53
N. J. A. C. 7:26-2.11.4 53
N. J. A. C. 7:26-2.11.5 53
N. J. A. C. 7:26-2.11.8 53
N. J. A. C. 7:26-2.12.2 49
N. J. A. C. 7:26-2.12.3 52
N. J. A. C. 7:27-2.3 52
N. J. A. C. 7:27-5.2(a) 52
N. J. A. C. 7:27-8.4(b) 52
N. J. A. C. 7:27-11.1 51
N. J. A. C. 7:27-11.2 52
N. J. A. C. 7:27-11.4 ..... 52, 53

Other Authorities:

Annotation, "Public Dump as Nuisance", 52 ALR 2d 1134 ... 56
Municipal Refuse Disposal, 3rd ed. (Chicago: Public Administration Service, 1970) 56
New Jersey State Sanitary Code 10, 46, 47, 48
New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) 10, 47

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1977.

—

No. 77-404.

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF OF APPELLANTS.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:1I-9, 10) unconstitutional is not reported (A6). The opinion

of the Superior Court of New Jersey, Chancery Division, in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711 (A14). The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975) (A32). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Brief. The opinion of the New Jersey Supreme Court, on remand from this Court, is published in the official reports as *City of Philadelphia v. State Dept. of Environ. Protec.*, 73 *N. J.* 562 (1977), and in the unofficial reports as *City of Philadelphia v. State*, 376 *A.* 2d 888 (N. J. Sup. Ct. 1977) (A62). Said opinion is cited as *Philadelphia v. New Jersey*, 73 *N. J.* 562 (1977) in the within Brief.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside two separate judgments of the New Jersey Supreme Court. The first judgment, which upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Commerce Clause grounds, was rendered on November 18, 1975 and entered on the same date. This Court noted probable jurisdiction over the appeal on April 5, 1976, 425 *U. S.* 910 (1976). Following oral argument, the judgment of the New Jersey Supreme Court was vacated and the case remanded "for reconsideration in light of the Resource Conservation and Recovery Act of 1976", *Philadelphia v. New Jersey*, — *U. S.* — (1977) (Slip sheet opinion, pp. 1-2) (A60). The second judgment, which was rendered and entered on June 20, 1977, upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Supremacy Clause grounds, and additionally "reaffirm[ed] the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above" (A74). A notice of appeal to the Supreme Court of the United States from both judgments was thereafter filed in the New Jersey Supreme Court on July 22, 1977 (A307).

The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is the interstate movement of solid or liquid waste for purposes of resource recovery, treatment or disposal "commerce" within the meaning of the Commerce Clause?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place and undue burden upon interstate commerce?

3. Is a state statute that prohibits persons from bringing solid and liquid waste into a state in conflict with a federal statute that (a) requires cooperation in the establishment of solid waste management plans for interstate regions, and (b) provides for the issuance of federal permits to owners and operators of hazardous waste treatment, storage or disposal facilities?

4. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard on the material issues of fact raised by their complaint prior to the final determination?

STATEMENT OF THE CASE.

This case challenges the constitutionality, on Commerce and Supremacy Clause grounds, of a statute which prohibits a person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." *P. L.* 1973, *c.* 363.

Legislative efforts to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State were first initiated seven and one half years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[1] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[2] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for the disposal of solid wastes originating in the State."

1. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

2. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[3]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, denominated the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State.[4] In his "statement" attached to the bill, the sponsor commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an un-

3. Information with respect to bills introduced in the New Jersey Legislature is available in the New Jersey Legislative Index.

4. Section 4 of the Act granted to the Commissioner of the Department of Environmental Protection the specific

> "power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State."
>
> *N. J. S. A.* 13:1I-4a

fortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[5] the President of the New Jersey Public Utilities Commission urged the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132, the Waste Control Act, passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the President of the New Jersey Public Utilities Commission was not accepted.

Upon signing the bill, the Governor issued a press release[6] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Two and one-half months later, on May 7, 1973, at a conference on waste management sponsored by the Tri-State Regional Planning Commission,[7] Grant F. Walton, Director of the Division of Environmental Quality, New

5. See footnote 2, *supra*.

6. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

7. Said Commission was formed by virtue of an interstate compact between the states of Connecticut, New Jersey and New York C. G. S. A. § 16-339 *et seq.*; N. J. S. A. 32:22B-1 *et seq.*; McK Unconsol. Laws § 830 *et seq.*

Jersey Department of Environmental Protection, made reference to the newly-enacted statute, saying:

> "I mentioned that New Jersey had just passed legislation to give us control over the material that comes in from out of state. . . ."
>
> • • •
>
> ". . . The great temptation would be just to prohibit all materials from coming into the state of New Jersey . . . *but we don't feel that is responsible or realistic.*"[8]

(Emphasis added)

The expressed temptation to prohibit was unquestionably motivated by political and not environmental concerns. In his prepared address at the Waste Management Conference, Mr. Walton readily acknowledged the environmental integrity of sanitary landfills and their potential for reclaiming ravaged lands for public recreational use: "The health hazard, water and air pollution and methane gas problems commonly associated with landfills," he said, "can be eliminated through the proper design and operation of the facility . . . Properly done, abandoned surface mines can become parks, playgrounds and golf courses of the future with little or no detriment to the environment."[9]

8. Presentation by Grant F. Walton published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, *p.* 101.

9. *Id.*, at 74.

An identical conclusion was expressed in the New Jersey Solid Waste Management Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm."
>
> • • •
>
> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area.
>
> • • •

Consistent with Mr. Walton's remarks no action was taken by the Commissioner of the Department of Environmental Protection to prohibit the incineration or landfill in New Jersey of solid waste collected outside the state.

Almost 8 months passed without further visible activity. Then on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release saying, in part:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey.
>
> • • •
>
> "[If a ban is not promptly imposed], the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up." [10]

9. (Cont'd.)

"The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards."

New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) pp. 2, 71 and 78.

10. The text of the entire press release reads as follows:

"I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Consistent with the October 19, 1973 directive from Acting Governor Beadleston, the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste in New Jersey,[11] *N. J. A. C.* 7:26-1.8 (proposed).

The New Jersey Department of Environmnetal Protection expressed the reasons for the proposed ban in para-

10. (Cont'd.)

ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

11. The text of the proposed rule read as follows:

7:26-1.8 Out of State Waste

–1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

–1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

graph IV of its "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A148). Not unexpectedly, references to public health and environmental quality were virtually non-existent. Rather, the reasons presented for the proposed administrative prohibition were: (1) to assure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[12]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[13]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[14] was surprisingly candid:

"A. Description of Bill's Effect—

> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"

• • •

"E. Departmental Comments—

> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."

• • •

(Emphasis added)

The "major difficulty" identified by the Department was competition for the purchase of landfill disposal space. Environmental considerations were noticable in their absence.

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to

12. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A85, 172).

More particularly in the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", the Department commented: "The failure on the part of our neighboring states to provide suitable disposal facilities of their own . . . *is increasing the cost of disposal for our own municipalities.*" (A125-126).

13. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

14. See footnote 2, *supra*.

David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A125-126), saying:

• • •

> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363, to become effective February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A82). Their simultaneous application for a temporary restraining order was supported, among other documents (A105, 108, 111, 118), by an affidavit of a licensed professional engineer (A115) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey." [15]

Based upon its conclusion that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division, issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A128). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [16]

15. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See *p.* 9 *supra*.

16. N. J. A. C. 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated, or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous, waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered

(A169). In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A131), which averred in pertinent part, as follows:

* * *

> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [N. J. A. C. 7:1-4]
>
> * * *
>
> . . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, *the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.*
>
> * * *
>
> The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.
>
> * * *
>
> . . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.
>
> In conclusion, *it is EPA policy that no* municipality or *State should take action to prevent the free flow of waste across* municipal or *state boundaries* provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices."
>
> (Emphasis added)

16. (Cont'd.)
with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."
A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A77.

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974.

On February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that a principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State (A96, 174). They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A86, 172).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the

engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A181-182), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[17] He also revealed that no effort had been made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A184, 187).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A188).[18] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A192-193), that summary judgment not be granted to appellants pending a hearing on the merits:

17. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

18. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact.

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A6) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A198), by which they appealed from the trial court's

grant of summary judgment to appellants, but not from the denial of their own motion for summary judgment.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A200). Said motion was denied by the Court on August 14, 1974 (A204).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[19] by order dated October 7, 1974 (A206). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution

19. In *Hackensack Meadowlands*, suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A32).

By its ruling, the New Jersey Supreme Court disposed, on the mertis, of a case concededly involving substantial disputed issues of material fact which had never been heard by the trial court.[20] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants' complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants' emergent motion for a stay of judgment and interim injunctive relief pending its further order (A212).

In an effort to remedy the aforesaid procedural impropriety, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A216). The trial court indicated that it would hold a plenary hearing within two weeks. In the alternative, appellants

20. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception, were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the New Jersey Rules of Court, the only question before the Supreme Court of New Jersey was whether the trial court correctly granted summary judgment to appellants.

sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the emergency stay that it had previously issued, effective December 31, 1975, and further

> "Ordered that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> Ordered that this Court does not retain jurisdiction." (A299).

Based upon this order, appellants were compelled, as a practical matter, to dismiss with prejudice every count in their complaint which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A300), the trial court

> "Further Ordered, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975 (A302). Thereafter, appellants duly filed a notice of appeal and a jurisdictional statement. Probable jurisdiction was noted on April 5, 1976, 425 *U. S.* 910 (1976).

On October 21, 1976, thirteen days before the scheduled date of oral argument, the President of the United States signed the Resource Conservation and Recovery Act of 1976, *Pub. Law* 94-580, 42 U. S. C. § 6901 *et seq.*, which amended comprehensively the Solid Waste Disposal Act, 42 U. S. C. § 3251 *et seq.*

At oral argument held on November 3, 1976, a question was posed by Mr. Justice White with respect to the effect of the aforesaid federal legislation on the matter before the Court. Appellants thereafter filed a motion seeking leave to submit a supplemental brief dealing with the effect of the Resource Conservation and Recovery Act of 1976 upon the validity of *P. L.* 1973, *c.* 363. Said motion was granted by order dated November 15, 1976 and supplemental briefs were filed simultaneously by both parties.

On February 23, 1977, a majority of the United States Supreme Court issued a *per curiam* opinion vacating the judgment of the New Jersey Supreme Court and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976, *Philadelphia v. New Jersey*, — *U. S.* — (1977) (Slip sheet opinion, pp. 1-2) (A59), saying, in pertinent part, as follows:

> "While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and

not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1977 pre-empts the New Jersey statute." [21]

On March 15, 1977, appellees moved the New Jersey Supreme Court for clarification or, in the alternative, ". . . for a stay of any lower court injunctive order which may be found presently to bar enforcement of Chapter 363 . . . ." (A320).[22] Appellees further moved for an expedited schedule in connection with the remand.[23]

By order dated April 4, 1977, the New Jersey Supreme Court granted appellees' motion for acceleration, but reserved decision on the application for a stay:

"This matter having been duly presented to the Court, it is . . . further

ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further

• • •

21. Mr. Justice Powell, speaking for four members of the Court, dissented commenting, "We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty."

22. On the date appellees' motion was filed, the United States Supreme Court—and not the New Jersey Supreme Court—still had jurisdiction of the appeal. Pursuant to Rule 59 of the Rules of the United States Supreme Court, jurisdiction remains vested in the Supreme Court until the issuance of its mandate, an event occurring 25 days after the issuance of its opinion.

23. The motion for acceleration was not opposed.

ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted." (A321).

Following oral argument, the New Jersey Supreme Court handed down its opinion on June 20, 1977, holding that *P. L.* 1973, *c.* 363 was not pre-empted, under the Supremacy Clause, by the Resource Conservation and Recovery Act of 1976 (A62). However, it stayed its judgment for a period of 30 days "to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment". *Philadelphia v. New Jersey*, 73 *N. J.* 562, 575 (1977) (A74).

Appellants duly filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on July 18, 1977 (A305). Thereafter, appellants filed a notice of appeal on July 22, 1977, and a jurisdictional statement on September 15, 1977. Probable jurisdiction was noted on November 28, 1977, — *U. S.* — (1977).

SUMMARY OF ARGUMENT.

Solid and liquid waste, the service of collecting, transporting, treating and disposing of same, and the sale of landfill space for the disposal of solid and liquid waste collected outside the state are recognized subjects of interstate commerce.

A statute which prohibits the entry of a subject of commerce, irrespective of condition or potential for harm, is directed against commerce and may not stand.

If a threat is caused to the public health and environmental quality by solid and liquid waste, or the process of treating, transporting and disposing of same, it is based upon the nature of the substance being regulated and not its place of origin. Regulation of such commerce must be accomplished in an evenhanded, nondiscriminatory manner.

The Court will decide for itself whether a statute represents a legitimate exercise of the state's police power, or whether it really amounts to a discriminatory regulation of interstate commerce and a direct burden thereon.

A police regulation which affects interstate commerce must not go beyond the necessities of the particular case. In light of the environmental integrity of properly designed and operated incinerators and sanitary landfills, there is no legitimate local public reason to prohibit entry, treatment or disposal of solid or liquid waste which originated or was collected in another state.

New Jersey has improperly attempted to secure an economic benefit for its residents, in contravention of the Commerce Clause of the United States Constitution, by adopting *P. L.* 1973, *c.* 363.

In addition, said statute must fall under the Supremacy Clause because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress contained in the Resource Conservation and Recovery Act of 1976.

At any event, in light of the many genuine issues of material fact, the New Jersey Supreme Court erred in upholding the constitutionality of *P. L.* 1973 *c.* 363 as not violative of the Commerce Clause absent a hearing, on the merits, before the trial court. Appellants were thereby denied due process of the law.

ARGUMENT.

A.

The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause.

In the proceedings before the New Jersey Courts, appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore are not within the purview of the Commerce Clause. This contention was rejected below, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 64 *N. J.* 451, 467 (1975), and is wholly unsupportable in law and in fact.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business." *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928); *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925); *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). This Court has consistently defined commerce in broad terms to include all commercial intercourse, including the component parts thereof, *Dahnke-Walker Co. v. Bondurant*, 257 *U. S.* 282, 290 (1921). Thus, the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972) and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle ranging across a state line, *Thorton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914) and telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882), have all been treated as commerce in a federal constitutional sense. See *U. S. v. Underwriters Assn.*, 322 *U. S.* 533, 549 (1944).

Not surprisingly, the proposition that solid waste collection and disposal is commerce has already been established by the federal courts.

In *United States v. Pennsylvania Refuse Removal Assn.*, 242 F. Supp. 794 (E. D. Pa. 1965), certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal." 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' argument that a worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce'* as used in the Act, United States v. Nat'l Ass'n of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n.*, 242 *F. Supp.*, *supra*, at 700 (Emphasis added).

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which

succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F. 2d* 806, 808 (3 Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).[24]

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is often a merchantable commodity.

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J.* Super. 160, 170 (Ch. Div. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, Judge (now Justice) Schreiber rejected appellees argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity." The New Jersey Supreme Court agreed, saying, ". . . certain types of solid waste may have legitimate market value for recycling or other purposes." *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467.

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary landfill facilities within the State (A123), and that certain communities and industries in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A186-187, 326-332). It is also established that the City of Yonkers, New York and Appellant City of Glen Cove have heretofore purchased disposal space in New Jersey from private solid waste disposal public utilities, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 476 (A55, 347). In addition

24. More recently, see *Mascaro & Sons, Inc. v. O'Hara, Inc.*, — *F. 2d* — (3 Cir. 1977), 1977-2 *Trade Cases*, ¶ 61,727.

automobile hulks, being a form of bulky waste, *N. J. A. C.* 7:26-1.43, regularly move in interstate commerce, *Alexandria Scrap Corporation v. Hughes*, 426 *U. S.* 794 (1976). Indeed, the House Report on the Resource Conservation and Recovery Act of 1976 candidly asserts "that most of our discarded materials have at some time entered the flow of interstate commerce."[25] It is part of the established course of business.

Governed by the aforesaid authorities, the interstate movement of solid waste for purposes of resource recovery, treatment or disposal unquestionably involves commercial intercourse.

Appellants' solid waste collection and disposal companies are New Jersey public utility corporations subject to regulatory control by the Board of Public Utility Commissioners, *N. J. S. A.* 48:2-13, *N. J. S. A.* 48:13A-1 *et seq.* Although a major component of their business activity is service, see *N. J. S. A.* 48:13A-2, they may also engage in the sale of methane gas, steam or other power-generating sources and recovered materials such as paper, glass, copper, steel, tin and aluminum (A351, 360).

In a very real sense, appellant solid waste disposal companies which operate sanitary landfills derive their principal business income from selling space for disposal purposes rather than from providing a service. The cost of operating sanitary landfills in an environmentally sound manner is enormous (A350, 366). Interestingly, the New Jersey Legislature, in the Solid Waste Management Act, *N. J. S. A.* 13:1E-1 *et seq.* felt compelled to observe:

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities and other solid

25. House Report No. 94-1491 accompanying HR 14496 (Comm. on Interstate and Foreign Commerce), at 9.

waste collectors to guarantee the flow of solid waste to such facilities."

N. J. S. A. 13:1E-2c

If prevented from obtaining sufficient minimum quantities of solid waste, the business of Kinsley's and of other appellant sanitary landfill owners will be greatly diminished or destroyed (A348-349, 366-367, 370, 373), *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8. This result would be particularly harsh and inequitable in the present case since expenditures for environmental controls approximating $500,000 have already been made at appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A366). The improvements would not have been made but for a long term contract with the City of Philadelphia (A366).

Appellant Landfill and Development Company is in a similar position (A350-351, 370). Unless *P. L.* 1973, *c.* 363 is struck down, it will lose approximately $700,000 in annual gross income (A369).

Moreover, if the interstate movement of solid waste for purposes of resource recovery, treatment or disposal is not commerce, then individual states can adopt repressive laws with impunity, thereby materially affecting channels of interstate commerce in solid waste.

Since probable jurisdiction was noted by this Court on April 5, 1976, a statute was passed by the Louisiana Legislature to proscribe the transportation of

> "any waste material which originated or was collected outside the territorial limits of the state into Louisiana with the intent to bury, store or otherwise dispose of such wastes in Louisiana until the office of health services and environmental quality of the Department of Health and Human Resources has determined that such action can be permitted without endangering the health, safety and welfare of any member of the public or animal life."

Prior to the adoption of said statute, seven states had adopted laws which, to varying degrees, prohibited the disposal of solid waste collected in another state.[26] Three other states imposed various regulatory limitations.[27]

If each state was free to pass such laws, commerce in solid waste collection and disposal services could be brought to a halt at state lines.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and dis-

26. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

27. Delaware, Illinois and Louisiana.

posal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. Absent controlling federal legislation, the Commerce Clause does not deprive the states of the power to regulate matters of legitimate local concern in areas where uniformity of regulation is not necessary, even when interstate commerce is, to some measure, regulated or affected thereby, *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 767 (1945).

However, in exercising its power, a state must be reasonable in its requirements, promote its objectives without discrimination, and not go beyond the necessities of the particular case, *Plumley v. Massachusetts*, 155 *U. S.* 461, 471 (1894), *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), *Savage v. Jones*, 225 *U. S.* 501, 525 (1912), *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937), *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), *Great A & P Tea Co. v. Cottrell*, 424 *U. S.* 366 (1976). As stated by Mr. Justice Clark in *Cities Service Co. v. Peerless Co.*, 340 *U. S.* 179, 186-187 (1950):

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of the state restrictions."

See also *Pike v. Bruce Church Inc.*, 397 *U. S.* 137, 142 (1970); *Hunt v. Washington State Apple Advertising Commission*, – *U. S.* – (1977).

In approaching Commerce Clause questions, this Court has consistently determined for itself whether a regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce, *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). Mr. Justice Reed emphasized the Court's responsibility in this area in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

> ". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The aforesaid principles are not new. They were applied in *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877) where this Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

> "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute,

> we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered . . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."
>
> *Rasmussen v. Idaho*, 181 *U. S. supra.* at 201 (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from

designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

> "We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."
>
> *Oreg.-Washington Co. v. Washington* 270 *U. S., supra,* at 96.

The New Jersey statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior* to exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra,* at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State

or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell*, 311 *U. S.* 454 (1940); *Head v. New Mexico Board*, 374 *U. S.* 424, 429 (1963).

A proscription against discrimination was similarly noted in the leading environmental case *Huron Cement Co. v. Detroit*, 362 *U. S.* 440 (1960), where an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> "... state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to any person, firm or corporation within the city, discriminates against interstate commerce as such. It *is a regulation of general application*, designed to better the health and welfare of the community . . . ." *Huron Cement Co. v. Detroit*, 362 *U. S., supra*, at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . , or unduly burdensome on* maritime activities or *interstate commerce. . . .*"
>
> *Huron Cement Co. v. Detroit*, 362 *U. S. supra*, at 443 (Citations omitted, emphasis added).

The Court in *Huron* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it would have been struck down.

Appellants respectfully contend that *P. L.* 1973, *c.* 363, while outwardly cloaked "in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.*, 431 *U. S.* 265, 285, n. 21 (1977), is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents, *H. P. Hood & Sons, Inc. v. DuMond*, 336 *U. S.* 525, 538 (1949).

The New Jersey Department of Environmental Protection explained the process this way:

> "In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban

on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collection of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. *This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburban and rural areas.*" (A123) (emphasis added)[28]

An identical sentiment was expressed by Acting Governor Beadleston who, on October 19, 1973, directed the Commissioner of the Department of Environmental Protection to initiate a ban upon the disposal in New Jersey of out-of-state garbage: ". . . the people of New Jersey," he said, "will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up", See p. 11, n. 10 *supra*. The record demonstrates overwhelmingly that the motivation for imposing the embargo was economic and not environmental.

Appellees admit that in enacting *P. L.* 1973, *c.* 363, a principal concern of the New Jersey Legislature was to preserve landfill areas in New Jersey for solid waste generated in the State (A96, 174). This it cannot constitutionally do.

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28. In *Mascaro & Sons, Inc. v. O'Hara, Inc.*, — *F. 2d* — (3 Cir. 1977), 1977-2 Trade Cases, ¶ 61,727, decided less than two months ago, the Third Circuit commented to the same effect:

> The haulers dump the refuse at a landfill location and pay the operator for the privilege. The amounts paid for transportation to the site and for landfill use are significant costs which affect the prices charged customers. In order to keep expenses low, haulers prefer to utilize landfills as close to the customers as is feasible.

In *Penna. v. West Virginia*, 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers."

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State*, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning back-

ward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr*, 255 *F. Supp.* 828 (W. D. Tex. 1966), aff'd 385 *U. S.* 35 (1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory against New Jersey in operation and effect (A374).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principal eloquently in *Baldwin v. G. A. F. Seelig*, 294 *U. S.* 511, 523 (1935). In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he observed:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews*, 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and is devoid of any legitimate local concern.

But even if, for the sake of argument, a legitimate local concern is found, that does not end the inquiry: "When discrimination against commerce . . . is demonstrated" said Mr. Chief Justice Burger less than 7 months ago, "the burden falls on the State to justify it both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission*, — *U. S.* — (1977), slip opinion at 18.

Appellees have argued that a prohibition against out-of-state solid waste will reduce volume and thereby preserve further acreage from use as disposal sites. There are two inherent fallacies with this reasoning. Firstly, sanitary landfills can be operated without any "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 *U. S. C.* § 6944. Secondly, *any* prospective use of land is subject to objection on the same grounds. For example, the erection and operation of a manufacturing plant or a school can be said to "forever ruin virgin land" and, if not properly regulated, to cause a threat to public health or environmental quality.

For the same reasons, appellees cannot justify the statute on account of the unavailability of nondiscriminatory alternatives. Less than nine months before *P. L.* 1973, *c.* 363 was introduced in the New Jersey Senate, the Waste Control Act was signed by the Governor, *N. J. S. A.* 13:1I1 *et seq.* Pursuant to Section 4 of that Act, the Commissioner of the New Jersey Department of Environmental Protection was granted express power to regulate and prohibit the incineration or landfill in New Jersey of solid

waste which originated or was collected outside the State, *N. J. S. A.* 13:1I-4a. Obviously, before Acting Governor Beadleston directed to the contrary, the Commissioner did not feel that a wholesale ban on interstate solid waste disposal was either necessary or desirable, see pp. 8-13 *supra*. More importantly, under the Waste Control Act, the Commissioner could impose a ban if other nondiscriminatory alternatives proved unsuccessful to protect the legitimate local interest of the State.

New Jersey has traditionally provided comprehensive regulatory controls to protect the health of its citizens and the quality of its environment. In 1958, the New Jersey Health Council adopted Chapter VIII-Refuse Disposal as part of the State Sanitary Code pursuant to authority conferred by *N. J. S. A.* 26:1A-7. Chapter VIII prohibited the operation of dumps and authorized the disposal of solid waste only through use of

> "(a) sanitary landfills established, conducted, operated and maintained in accordance with standards set forth in Regulation 4, 5, and 6 of this Chapter
>
> OR
>
> (b) Incinerators constructed, operated and maintained in accordance with Code or Regulation of the New Jersey Air Pollution Control Commission.
>
> (c) Other methods of disposal as may be approved by the State Department of Health."

The regulations collected in Chapter VIII-Refuse Disposal, were adopted, consistently with the mandate in *N. J. S. A.* 26:1A-7, ". . . to preserve and improve the public health in this State." [29]

29. *New Jersey State Sanitary Code* (Trenton: New Jersey State Department of Health, rev. September 1963) p. 1.

On April 13, 1970, the Public Health Council adopted a revision of Chapter VIII of the State Sanitary Code which substantially expanded the previously-existing regulations. The authorized methods of disposal were not changed or altered in any way, but additional operational requirements were imposed to further protect the public health. On April 22, 1970, the functions, powers and duties of the Public Health Council were transferred to and vested in the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection, *N. J. S. A.* 13:1D-7a. Chapter VIII of the State Sanitary Code was not repealed by the administrative reorganization; it remained in full force and effect, under the jurisdiction of the Department of Environmental Protection, *N. J. S. A.* 13:1D-15, 13:1E-66.

Approximately three months later, on July 31, 1970, the *New Jersey Solid Waste Management Plan* was published. Said Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey, reported with candor:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm.
>
> • • •
>
> "The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards." [30]

30. *New Jersey State Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) at pp. 2 and 78.

Chapter VIII of the State Sanitary Code continued in effect until July 1, 1974, when it was superseded by the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* In adopting said Rules, the Commissioner of the Department of Environmental Protection commented: "No rule was altered in such a way as to provide less protection to the public health, safety or welfare than provided by the Chapter VIII regulations."

The principal environmental engineer of the Bureau of Solid Waste management was more direct in his assessment of the Rules. During a deposition conducted on March 13, 1974, he grudgingly admitted that the Rules as then proposed were entirely adequate to protect the health, safety and welfare of the people of New Jersey and the quality of its environment (A181-182).

The Rules, which are extremely comprehensive in nature, provide that the exclusive methods by which solid waste may be disposed in New Jersey are through use of:

> "a. Sanitary landfills established, operated and maintained in accordance with the regulations set forth in this subchapter.
>
> "b. Incinerators constructed, operated and maintained in accordance with Regulations of the New Jersey State Department of Environmental Protection promulgated under authority of the Air Pollution Control Act 1954 and regulations set forth in this subchapter.
>
> "c. Transfer station, composting facility, resource recovery or other processing facility, constructed and operated in accordance with regulations set forth in this subchapter."
>
> *N. J. A. C.* 7:26-2.1.2

Dumps are expressly prohibited. *N. J. A. C.* 7:26-2.1.1.

No person may engage in the disposal of solid waste in New Jersey without having first obtained approval of a registration statement and engineering design from the Department of Environmental Protection. *N. J. A. C.* 7:26-2.2.2; 7:26-2.2.3. Designs for sanitary landfills, incinerators, and other methods of disposal must be prepared by a New Jersey licensed professional engineer and submitted to the Bureau of Solid Waste Management for its review, *N. J. A. C.* 7:26-2.4. In addition to other requirements, each engineering design for a sanitary landfill must include (a) a designation of the property or portion thereof for which approval is being sought; (b) contours and proposed final elevations; (c) proposed sequence of development; (d) soil borings; (e) soil classifications; (f) soil profile and aquifer information; (g) geological and ground water data; (h) identification of registered wells and public buildings within a one-half mile radius; (i) surface and subsurface drains; (j) leachate collection system, if applicable; (k) profile views for excavation, and grades and elevations for dikes, berms or other pollution protection devices or techniques; (1) proposed landscaping, beautification and screening techniques; (m) gas venting and monitoring system; (n) ground water monitoring wells; and (o) estimated capacity. *N. J. A. C.* 7:26-2.12.2.

Special emphasis is placed upon the control and elimination of ground and surface water pollution at sanitary landfill sites. To accomplish this objective *N. J. A. C.* 7:26-2.5.4 provides, in pertinent part:

> "No new sanitary landfill shall be conducted, nor shall an existing landfill continue to be conducted where the solid waste, in whole or in part, or the leachate produced as a result of the sanitary landfill, impairs the quality of the surface or

> ground waters of this state to a degree that would degrade the quality of either the surface or ground waters of this state beyond the classification established by the Department for the surface water in question or the potable water standard established by the Department in the case of ground water."

In addition, *N. J. A. C.* 7:26-2.5.22 requires the installation of ground water monitoring systems as a condition precedent to the operation of a new sanitary landfill or the expansion of an existing facility:

> "No new solid waste facility shall begin operations without first installing a ground water monitoring system constructed and located in accordance with instructions furnished by the Department. Further, no new facility shall begin operations prior to obtaining ground water samples, and analyses thereof, for the purpose of establishing baseline information."

The Department of Environmental Protection can require the installation of an impermeable liner (A238), where necessary, to create a barrier between the deposited solid waste and exposed surfaces that would otherwise be unsatisfactory for land disposal purposes.

Gas venting systems must be installed at every existing sanitary landfill site, and at every new facility, as a condition of continued operation. In this connection, *N. J. A. C.* 7:26-2.5.21 provides:

> "New facilities shall install the gas venting and monitoring systems indicated on the approved engineering design prior to operating. A phase-in of the system is permitted if so indicated on the approved engineering design. Existing facilities shall be required to design, obtain departmental approval of the design, and implement a gas venting and monitoring system when so ordered by the Department as a result of the detection of landfill gases beyond the perimeter of the designated fill area. Detection may be by ground probing or vegetation damage. The recovery of landfill gases for use as a fuel is not prohibited by this subsection. In no case shall the accumulation of combustible gases in excess of their lower explosive limits within confined structures on or adjacent to the facility be permitted."

In addition to the aforesaid, a sanitary landfill must effectively control scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.5.6, dust, *N. J. A. C.* 7:26-2.5.7, odor, *N. J. A. C.* 7:26-2.5.8, and insects and rodents, *N. J. A. C.* 7:26-2.5.12. Other stringent and carefully conceived operational requirements, too numerous to mention, are also imposed by the Rules.

The situation with respect to the regulation of incineration is much the same. The construction and operation of incinerators for solid waste disposal is governed by both the Rules of the Bureau of Solid Waste Management, and by the Rules of the Bureau of Air Pollution Control, *N. J. A. C.* 7:27-11.1 *et seq.*

No person may construct a new incinerator, or use a new or altered incinerator, unless a "Permit to Construct, Install or Alter Control Apparatus or Equipment" and a "Certificate to Operate Control Apparatus or Equipment" have first been obtained from the Bureau of Air Pollution

Control, Department of Environmental Protection, *N. J. A. C.* 7:27-11.4. In order to assure that incinerators and control equipment will not pollute the air,

> "The Department may require such details regarding the equipment or control apparatus as it considers necessary to determine that the equipment or control apparatus is designed to operate without causing a violation of any provisions of the New Jersey Air Pollution Control Act or any provisions of codes, rules or regulations promulgated hereunder. . . ."
>
> *N. J. A. C.* 7:27-8.4(b)

The Rules of the Bureau of Air Pouultion Control contain specific emission standards with respect to particles emission, smoke emission, unburned waste or ash emission, and odor emission, *N. J. A. C.* 7:27-11.4. Most importantly, an incinerator cannot be constructed or used unless it is ". . . effective for the purpose of air pollution control". *N. J. A. C.* 7:27-11.2. See also *N. J. A. C.* 7:27-5.2(a) being a regulation of general applicability which prohibits the emission into the outdoor atmosphere of substances in quantities which shall result in air pollution. Open burning is specifically prohibited, *N. J. A. C.* 7:27-2.3.

An incinerator cannot be used for solid waste disposal purposes until an engineering design prepared by a New Jersey licensed professional engineer has been filed with and approved by the Bureau of Solid Waste Management. Such design must contain information with respect to (a) rated capacity, (b) current and anticipated daily loadings, (c) unloading and storage facilities, (d) emergency storage facilities, (e) alternate unloading locations, (f) rodent

and odor control techniques, (g) daily residue tonnage, (h) disposal location residue, and (i) accompanying recycling or reclamation activity, if any. *N. J. A. C.* 7:26-2.12.3.

The Rules regulate the operation as well as the design of incinerator facilities. Areas where putrescible waste is stored or deposited must be cleaned within each twenty-four hour period, and no such waste may be stored longer than twenty-four hours without acceptable treatment to prevent putrefaction. *N. J. A. C.* 7:26-2.11.1; 7:26-2.11.2. A program to control the scattering of papers and other lightweight material, *N. J. A. C.* 7:26-2.11.3, dust, *N. J. A. C.* 7:26-2.11.4, odors, *N. J. A. C.* 7:26-2.11.5, and insects and rodents, *N. J. A. C.* 7:26-2.11.8 must be implemented at each facility.

The New Jersey Department of Environmental Protection is not the only state administrative agency authorized to supervise the operation of solid waste facilities. Regulatory control is independently conferred upon, and may be exercised by, the Board of Public Utility Commissioners. *N. J. S. A.* 48:2-23 provides as follows:

> "The board may, after hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and to maintain its property and equipment in such condition as to enable it to do so."

The fact that there is no existing substantial or unreasonable threat to public health or environmental quality,

and that there is a reasonable, nondiscriminatory alternative to exclusion, is further independently confirmed by applicable provisions of the Resource Conservation and Recovery Act of 1976, 42 *U. S. C.* § 6901 *et seq.* Pursuant to the terms of said Act, the Administrator of the United States Environmental Protection Agency is directed to establish criteria for determining which facilities may be classified as sanitary landfills, and which will be classified as open dumps. The criteria must, at a minimum, eliminate any reasonable chance of adverse effects on health or the environment from land disposal:

> "Not later than one year after the date of enactment of this section, . . . the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps . . . . At a minimum, such criteria shall provide that a *facility may be classified as a sanitary landfill* and not an open dump *only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.*"
>
> 42 *U. S. C.* § 6944
> (Emphasis added)

Sanitary landfills are not treated as a mere alternative to other forms of disposal; they are viewed as the principal disposal source. In describing the most effective approach for dealing with discarded materials, the Committee on Interstate and Foreign Commerce, United States House of Representatives, commented:

> "The Committee recognizes that the most effective approach for alleviating the problems created by discarded materials is a comprehensive discarded materials management approach. Such an approach includes the use of techniques to recover the greatest amount of energy and materials possible from the discarded materials, reduce waste residuals to a minimum, and *provide for an environmentally sound disposal of the remainder, principally through sanitary landfill.*"[31]

Congress was familiar with the problems typically associated with land disposal. It recognized that the improper disposal of wastes may present a danger to public health and environmental quality, 42 *U. S. C.* § 6901 (b)(2), but it also understood that "the effects on human health and the environment from real sanitary landfill should be slight." [32]

Although countless opportunities were presented, appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste is such that it will always spread pestilence and disease. Quite to the contrary, appellees have admitted that properly designed and regulated sanitary landfills can be operated with no reasonable likelihood of harm to the public or to the environment (A181-182). This admission is in total harmony with other judicial and scholarly authorities.

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31. House Report No. 94-1491 accompanying H. R. 14496 (Comm. on Interstate and Foreign Commerce), at 32 (Emphasis added).

32. Id., at 37.

In *Horn v. Community Refuse Disposal, Inc.*, 186 *Neb.* 43, 180 *N. W.* 2d 691 (Sup. Ct. 1970), plaintiffs brought an action to enjoin the establishment and operation of a sanitary landfill. The court denied the application saying:

> "The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground waters, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result."
>
> *Horn v. Community Refuse Disposal*, 180 *N. W.* 2d, *supra*, at 692.

The overwhelmingly accepted rule is that incinerators and sanitary landfills which are properly maintained and operated are not public nuisances; *Wood v. Town of Wilton*, 156 *Conn.* 304, 240 *A.* 2d 904 (Sup. Ct. 1968); *Rocchi v. Zoning Bd. of App. Town of Glastonbury*, 157 *Conn.* 106, 248 *A.* 2d 922 (Sup. Ct. 1968); *Myers v. City of Hagerstown*, 214 *Md.* 312, 135 *A.* 2d 147 (Ct. App. 1957) (and cases therein cited); Annotation, *"Public Dump as Nuisance"*, 52 *ALR* 2d 1134.

All too often, the words "sanitary landfill" and "dump" are confused with one another.[33] They are very different

33. See *Municipal Refuse Disposal*, 3rd ed. (Chicago: Public Administration Service, 1970), pg. 93, wherein it is stated:

> Although the sanitary landfill as a method of refuse disposal was given a clean bill of health many years ago, its acceptance by the public is still far from unanimous. The public has too often heard the terms "landfill", "dump", and "sanitary landfill" used interchangeably and does not understand the difference between a sanitary landfill and a landfill or dump. Unfortunately there are too many

entities.[34] The Rules of the Bureau of Solid Waste Management define a sanitary landfill as:

> "The land disposal site employing an *engineered method of disposal* of solid waste *in a manner that minimizes environmental hazards*, including, but not limited to the spreading of the solid waste in thin layers, compacting the waste to the smallest practical volume, and applying cover material on a daily or more frequest basis."
>
> *N. J. A. C.* 7:26-1.4.54 (Emphasis added)

33. (Cont'd.)

disposal facilities labeled "sanitary landfills" which are glaringly deficient in some of the essential elements. The 1968 National Survey shows that 94 per cent of all landfill refuse disposal projects fall short of complying with all criteria for fully acceptable operations. The resulting public image of sanitary landfills has been damaging.

A well-located, well-designed, and efficiently operated sanitary landfill meets public health standards and requirements for control of air and water pollution, fire, and nuisances:

1. Vector breeding or sustenance is prevented by eliminating harborage and food supply for rats, flies, and other vermin.

2. Air pollution by dust, smoke, and odor is controlled.

3. Fire hazards are controlled during operational phases. (They are negligible in a completed fill.)

4. Pollution or surface and ground waters is precluded.

5. All nuisance factors are effectively controlled; i.e., the system is aesthetically acceptable and noise is kept to a minimum.

34. Pictorial illustrations of a "sanitary landfill" and a "dump" appear on the sheet facing page 58.

A dump, on the other hand, is separately defined as:

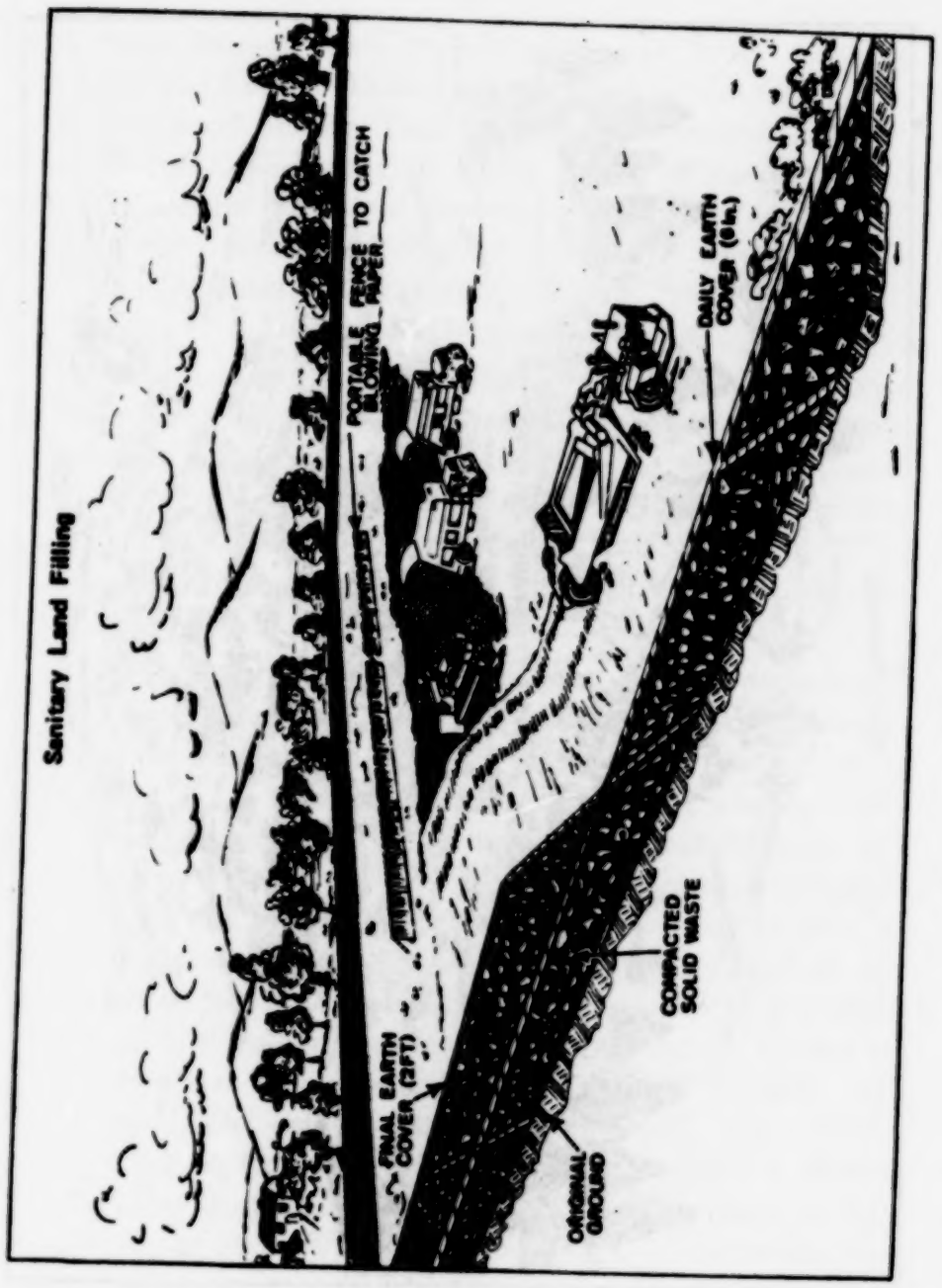
> "A land site at which solid waste is disposed of in a manner which does not protect the environment, is susceptible to open burning, or is exposed to the elements, vectors, and scavengers."
>
> *N. J. A. C.* 7:26-1.4.23.

When dumps were determined to be hazardous to human health, their operation was entirely prohibited in the State of New Jersey, *N. J. A. C.* 7:26-2.1.1. No distinction was made between dumps which accepted for disposal solid waste collected within New Jersey and those which accepted waste collected outside the State. The regulation acted in a non-discriminatory, even-handed manner in addressing a legitimate public problem. It was the method of disposal which posed a substantial threat to public health and environmental quality, *not* the substances disposed of or the place of their origin.

Environmental hazards are minimized by the sanitary landfill disposal method, and by incineration, due to the emphasis placed upon design and sanitary operation. Origin of wastes is not related to these criteria. The degree to which a disposal mode presents a threat to public health and environmental quality is entirely within the regulatory control of the State.

Interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce, which should not be disturbed.



supra, at 363-365; *Swift & Co. v. Wickham,* 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U. S. 111 (1965), aff'd 364 F. 2d 241 (CA 1 1966), cert. denied, 385 U. S. 1036 (1967)."

Jones v. Rath Packing Co., 430 *U. S., supra,* at 525-526.

Appellants respectfully submit that *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz,* 312 *U. S.* 52, 67 (1940).

The procedure for applying the *Jones* test to Supremacy Clause questions was set forth several years ago by Mr. Justice White in *Perez v. Campbell,* 402 *U. S.* 637, 644 (1971) as follows:

"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

P. L. 1973, *c.* 363 has already been construed by the New Jersey Supreme Court: it prohibits any person from bringing into New Jersey any solid or liquid waste which originated or was collected outside the State, except garbage to be fed to swine, until permitted and regulated by the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "Commissioner"), *Hackensack Meadowlands v. Mun. Landfill Auth.,* 68 *N. J.* 451, 468 (1975).

The Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA") has not yet been construed. However, its expressed direction in relation to hazardous waste management and to interstate solid waste management is clear and unambiguous.

Hazardous Waste Management.

Not later than 18 months after the date of enactment of Sections 3003, 3004 and 3005 of RCRA, 42 *U. S. C.* §§ 6923, 6924 and 6925, the Administrator of the United States Environmental Protection Agency (hereinafter "Administrator") must promulgate regulations (a) establishing standards, applicable to transporters of hazardous waste, as may be necessary to protect human health and the environment, (b) establishing standards, applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste as may be necessary to protect human health and the environment, and (c) requiring each person owning or operating a facility for hazardous waste treatment, storage or disposal to secure a permit for such facilities. The Administrator, or a State, if applicable, cannot issue a permit unless a facility complies with applicable requirements of RCRA, 42 *U. S. C.* § 6925(c); and proposed disposal sites must be separately listed in permit applications, 42 *U. S. C.* § 6925(b).

Although a state may develope its own hazardous waste program, 42 *U. S. C.* § 6926, it is specifically prohibited, with certain exceptions not material here, from imposing any requirements less stringent than those adopted by the Administrator, 42 *U. S. C.* § 6929.

The Congressional approach to hazardous waste management is particularly significant for two reasons. Firstly, since federal—and state—regulatory controls must, at a minimum, be protective of "human health and the en-

vironment", 42 *U. S. C.* §§ 6922, 6923, 6924 and 6929, then *a fortiori*, a state can adequately protect its vital land resources by something less than total exclusion. Secondly, a federal permit issued to a person owning or operating a facility for the treatment, storage or disposal of hazardous waste pursuant to 42 *U. S. C.* § 6925 "must be understood to be what it purports to be, a legislative authorization" to treat, store or dispose of hazardous waste regardless of its point of origin, *Gibbons v. Ogden*, 22 *U. S.* 1, 214 (1824).[35]

The effect of restrictive state legislation upon federal licensees was recently reviewed in *Douglas v. Seacoast Products, Inc.*, 431 *U. S.* 265 (1977). Speaking for seven members of the Court in striking down a Virginia statute which, in effect, prohibited non-residents of Virginia from catching menhaden in the Virginia portion of the Chesapeake Bay, Mr. Justice Marshall declared:

> "A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fisherman eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishing beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent."
>
> *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*, at 285-286.

35. In the context of the present litigation, the evident purpose of a federal permit to operate a hazardous waste disposal facility is to confer upon the holder the right to engage in the activity which gives the permit its real value, namely acceptance from any source of hazardous waste for storage, treatment or disposal, *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*.

While a state may impose reasonable conservation regulations to protect its vital resources, such measures must be designed to effectuate a legitimate local public interest in an evenhanded manner, *Huron Cement Co. v. Detroit*, 362 *U. S.*, *supra* at 443; *Douglas v. Seacoast Products, Inc.*, 431 *U. S.*, *supra*, at 278. This New Jersey has not done.

Despite its unquestioned power to adopt reasonable nondiscriminatory regulations, New Jersey chose the politics of exclusion when other non-restrictive alternatives were both suitable and adequate.

Nothing demonstrates this better than the State's approach to hazardous waste management.

Less than 1 year ago, the New Jersey Legislature approved a supplement to the Solid Waste Management Act (1970) governing the disposal of hazardous waste, chemical waste, bulk liquids and pesticides in the ground, *N. J. S. A.* 13:1E-38 *et seq*. Section 5 of said supplement provides, in pertinent part, as follows:

> "After March 15, 1980, no solid waste facility shall accept or receive for disposal, any hazardous waste, chemical waste, bulk liquid or pesticide unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environment protection] for the entire system."
>
> *N. J. S. A.* 13:1E-42.

Not surprisingly, the Assembly Energy and Natural Resources Committee which reviewed the Act prior to its passage, discounted good-intentioned concerns about environmental degradation, saying:

> ". . . As originally introduced, this bill would have prohibited any solid waste facility located within . . . 2 miles of a major aquifer, from accepting such solid waste for disposal. The Senate Energy and Environment Committee changed the '2-mile' limitation to '1,000 yards.'
>
> The Assembly Energy and Natural Resources Committee saw much merit in the sponsor's intentions, but felt that *the prohibition of disposal within 1,000 yards of a major aquifer* was too stringent and *would*, unintentionally, *prevent the location of such solid waste disposal facilities where they would present no danger to the public health and safety. . . .*"
>
> Assembly Energy and Natural Resources Committee Statement to S. 1493 dated August 2, 1976. (Emphasis added)

The position of the Assembly Committee was adopted by the New Jersey legislature. The bill, as enacted, permits the disposal of hazardous wastes and pesticides in all sanitary landfill facilities—even those located in or near major aquifers—provided a system for the interception, collection and treatment of leachate generated at the facility has been approved by the Department of Environmental Protection and installed at the site.

Since hazardous waste can be discarded in a properly designed, operated and regulated disposal facility with no reasonable prospect of harm to public health or to environmental quality, then there is no legitimate local public interest to be effectuated by the unlimited exclusion from New Jersey of out-of-state hazardous waste. That being the case, *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause for improperly limiting the full use and enjoyment of privileges inhering in a federal permit.

Interstate Solid Waste Management.

There is a second, equally compelling, Supremacy Clause problem with *P. L.* 1973, *c.* 363 which necessitates its invalidity: the statute stands as an obstacle to the establishment of solid waste management plans for interstate regions.

Pursuant to Section 4002 of RCRA, the Administrator must issue guidelines that identify areas "which have common solid waste management problems and are appropriate units for planning regional solid waste management services" within 180 days after the section's enactment, 42 *U. S. C.* § 6942(a). In the event an area identified by the Administrator is in two or more states, the respective Governors are specifically required by federal law to consult, cooperate and fix the precise boundaries of the region, 42 *U. S. C.* § 6946(c)(1). Once the boundaries have been established appropriate elected officials of general purpose units of local government must establish or designate an agency to develop a plan for the region, 42 *U. S. C.* § 6946(c)(2). It is essential to note that the public officials referred to in the federal Act have no dis-

cretion in the matter. Congress has mandated that they "shall" take the designated action.[36]

Consistent with the directive contained in 42 *U. S. C.* § 6942, on May 16, 1977, the Administrator promulgated Interim Guidelines for the Identification of Regions and Agencies for Solid Waste Management, 40 *CFR* § 255. Among the criteria listed for identifying regions are "Geographical areas which have a history of cooperating to solve problems in environmental or other related matters", 40 *CFR* § 255.10(a). Preliminary identification of regions is to be made by the Govenor or his or her representative, 40 *CFR* § 255.20, taking into consideration the published criteria for identifying regions, 40 *CFR* § 255.10, as well as the boundaries of Standard Metropolitan Statistical Areas (hereinafter "SMSA"), 40 *CFR* § 255.24(c). Once a Governor recommends the identification of an interstate region, concerned officials in the entire recommended region must be consulted, 40 *CFR* § 255.24.

Significantly, New Jersey and Pennsylvania have a history of cooperating to solve environmental and other problems. In 1966, the two States established the Delaware Valley Urban Area Compact for the coordination of regional planning in the compact area, *N. J. S. A.* 32:27-1 et seq., 73 *P. S.* § 701. Said area specifically included the counties of Burlington, Camden, Gloucester and Mercer in the State of New Jersey, and the counties of Bucks, Chester, Delaware and Montgomery and the City of Philadelphia in the Commonwealth of Pennsylvania, *N. J. S. A.* 32:27-2(b).

The Delaware Valley Regional Planning Commission, which was created by the Compact, quickly identified

36. Suits to enforce any requirement which has become effective pursuant to the Resource Conservation and Recovery Act of 1976 may be brought by any person, 42 *U. S. C.* § 6972(a).

solid waste planning as one of its statutory responsibilities. In 1969, the agency commissioned a 6 volume Regional Solid Waste Management Study for the subject area,[37] as part of its recognized planning function.

Furthermore, the Philadelphia SMSA includes, with the single exception of Mercer County, the very same counties and city participating in the Delaware Valley Urban Area Compact; and that is coterminus with one of the geographical areas involved in this litigation.

New Jersey has also entered into a compact with the States of Connecticut and New York, *N. J. S. A.* 32:22B-1 *et seq.*, *C. G. S. A.* § 16-339 *et seq.*, *McK Unconsol. Laws* § 830 *et seq.* Not unexpectedly, solid waste management planning falls within the ambit of the compact, see p. 8 *supra*.

It is difficult to conceive how an interstate solid waste management plan can be developed when a participating state prohibits the entry within its borders of solid or liquid waste which originates or is collected outside the territorial limits of the state. A plan cannot be developed and implemented between unwilling participants.

In *Perez v. Campbell*, 402 *U. S.*, *supra*, at 652, the United States Supreme Court re-emphasized the controlling principle "that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states are free to prohibit the entry of solid waste originating in other states.

37. *Regional Solid Waste Management Study Design Materials*, 6 vols. (Philadelphia: University of Pennsylvania, Fels Institute of Local and State Government, 1969) (typewritten manuscripts).

While it is true that the Committee on Interstate and Foreign Commerce, U. S. House of Representatives, in its report on H. R. 14496, commented: "At this time federal preemption of this [discarded materials] problem is undesirable, inefficient, and damaging to local initiative," p. 33, that remark was directed to the overall "discarded materials problem", and not to the relationship of specific state legislation with particular provisions in RCRA. Congress had no intention, either express or implied, to bar concurrent state legislation in the discarded materials area, but it also did not intend to sanction state enactments which would frustrate "any part of the purpose of the federal legislation." *Colorado Comm'n v. Continental*, 372 *U. S.* 714, 724 (1963).

Eleven states have already adopted laws which by their express terms, in varying degrees, directly affect the movement of solid waste in interstate commerce, see pp. 32-33, *supra*. Even if these laws are not in actual conflict with RCRA (which appellants do not concede) they establish an unmistakable potential for conflict, *City of Burbank v. Lockheed Air Terminal*, 411 *U. S.* 624 (1973), *Jones v. Rath Packing Co.*, 430 *U. S.* 519 (1977). This they may not constitutionally do under the Supremacy Clause.

D.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants' motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They, like appellees, acknowledged the existence of other issues upon which summary judgment could not be granted (A191, 192-193).

The trial judge's opinion reveals his determination as a matter of federal constitutional law (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that

P. L. 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A198) appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented

a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result lacked fundamental fairness. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A192-193):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on

the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.* 363 was not being attacked on Commerce Clause grounds alone.[38]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A299). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that *P. L.* 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment ini-

38. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

tially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

As a practical consequence of this action,[39] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean*, 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.*, 339 *U.S.* 306 (1950).

39. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who twice stayed the mandate of the New Jersey Supreme Court.

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination. *Rhodes v. Houston,* 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill,* 281 *U. S., supra,* at 678. It was asserted a second time less than two weeks later in a motion addressed to the New Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A300),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

CONCLUSION.

The New Jersey Supreme Court has decided issues of national importance in a way not in accord with the decisions of this Court. It has also so far departed from the accepted and usual courses of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	14
ARGUMENT:	
Point I—Since the Federal Resource Conservation and Recovery Act of 1976 expressly recognizes that the disposal of waste on the land may present a danger to public health and the environment and that the states have primary responsibility for planning and management to reduce this danger, the Act permits a state to restrict the use of landfills within its boundaries to the disposal of waste generated in the state	16
Point II—The requirement that the use of landfills within a state be restricted to the disposal of waste generated in that state falls within the basic power of the state to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause of the United States Constitution	28
Point III—The record before the Supreme Court of New Jersey provided a reasonable basis for sustaining the legislative finding that the public health and environmental problems caused by landfills are exacerbated by forcing New Jersey to accept waste generated out of state and thus there was no need for a plenary hearing before the trial court	53
CONCLUSION	60

PAGE

Cases Cited

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) 27

American Can Co. v. Oregon Liquor Control Com'n, 15 Ore. App. 618, 517 P.2d 691 (1973) 42, 43

Asbell v. Kansas, 209 U.S. 251 (1908) 32

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 16, 23

Berman v. Parker, 348 U.S. 26 (1954) 29

Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) 29, 33

Bradley v. Public Utility Com'rs, 289 U.S. 92 (1933) 44

Brimmer v. Rebman, 138 U.S. 78 (1891) 33

Brotherhood of Loc. F & E v. Chicago, R.I. & P.R.R. Co., 393 U.S. 129 (1968) 29, 33

City of Philadelphia v. State Dept. of Environ. Protec., 73 N. J. 562, 376 A. 2d 888 (1977) 14

Clason v. State of Indiana, 306 U.S. 439 (1939) 31-34, 50

Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714 (1963) 20

Cooley v. Board of Wardens, 12 How. 299 (1851) 28

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 29

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 48

EPA v. Brown, 431 U.S. 99 (1977) 24, 27

Evco v. Jones, 409 U.S. 91 (1972) 36, 42, 57

Falcone v. Middlesex County Med. Soc., 47 N. J. 92, 219 A2d 50 (1966) 54

PAGE

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) 16

Freeman v. Hewit, 329 U.S. 249 (1946) 28

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 51

Gooch v. United States, 297 U.S. 124 (1936) 48

Great A.&P. Tea Co. v. Cottrell, 424 U.S. 366 (1976)..28, 29

Hebe Co. v. Shaw, 248 U.S. 297 (1918) 58

Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) 48

Hoke v. United States, 227 U.S. 308 (1913) 48

H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) ..28, 33, 49

H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) 20

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 45, 46, 58

Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) 16, 29, 48

Investment Company Institute v. Camp, 401 U.S. 617 (1971) 27

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 51

Irving Isko v. Planning Bd. of Tp. of Livingston, 51 N. J. 162, 238 A2d 457 (1968) 54

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 25

Local Union No. 10 v. Graham, 345 U.S. 192 (1952) ..36, 57

Milk Control Board v. Eisenberg Farms Products, 306 U.S. 346 (1939) 29

Mintz v. Baldwin, 289 U.S. 346 (1933) 16

PAGE

Missouri v. Illinois & Chicago District, 180 U.S. 208 (1901) 51

National League of Cities v. Usery, 426 U.S. 833 (1976) 24, 33

New Jersey v. New York City, 283 U.S. 473 (1931) 51

New York v. New Jersey, 256 U.S. 296 (1921) 51

New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 27

North Dakota v. Minnesota, 263 U.S. 365 (1923) 51

Oklahoma v. Kansas Nat. Gas Co., 221 U.S. 229 (1911) 49

Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507 (1947) 47

Parker v. Brown, 317 U.S. 341 (1943) 37, 47

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) ..48, 49

Philadelphia v. New Jersey, 430 U.S. 141 (1977) 14

Pike v. Bruce Church, 397 U.S. 137 (1970) 31

Price v. Illinois, 238 U.S. 446 (1915) 32

Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) 47

Rahrer, In re, 140 U.S. 545 (1891) 47

Railroad Co. v. Husen, 95 U.S. 465 (1877) 33

Rasmussen v. Idaho, 181 U.S. 198 (1901) ..... .32

Reid v. Colorado, 187 U.S. 137 (1902) 16, 55

Robertson v. California, 328 U.S. 440 (1945) 33

Senior Appeal Examiners, In re, 60 N.J. 356, 290 A. 2d 129 (1972) 59

PAGE

Sligh v. Kirkwood, 237 U.S. 52 (1915) 30, 31, 37

Smiley v. Kansas, 196 U.S. 443 (1904) 46

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) 29, 57

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 29, 30

So. Ocean Landfill v. Mayor & Coun. Tp. of Ocean, 64 N. J. 190, 314 A2d 65 (1974) 50

The Minnesota Rate Cases, 230 U.S. 352 (1913) 32

United States v. Bishop Processing Company, 287 F. Supp. 624 (D. Md. 1968), aff'd 423 F.2d 469 (4th Cir.), cert. den. 398 U.S. 904 (1970) 48

United States v. Pennsylvania Refuse Removal Association, 242 F. Supp. 794 (E.D. Pa. 1965), aff'd 357 F.2d 806 (3rd Cir. 1966), cert. den. 384 U.S. 961 (1966) 48

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEES

Question Presented

Is a state which allows land to be used for the disposal of waste generated within its boundaries compelled either by the Federal Resource Conservation and Recovery Act of 1976 or the Commerce Clause to allow that land also to be used for the disposal of waste generated in other states?

Counter-Statement of the Case

On January 2, 1974, the Governor of New Jersey signed into law chapter 363 of the Laws of 1973, which was to become effective on February 1, 1974. This legislation contained an express finding that:

> ". . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9 (App. 75).

Based on this finding the New Jersey Legislature directed that:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." N.J.S.A. 13:1I-10 (App. 75-76).

Pursuant to the authority of chapter 363 the Commissioner of the New Jersey Department of Environmental Protection promulgated rules and regulations, which were to become effective concurrently with the statute, providing that:

> "No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:
>
> "(a) Garbage to be fed to swine in the State of New Jersey;
>
> "(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
>
> "(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> "(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be

> treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J.A.C. 7:1-4.2 (App. 81)

The complaint in this matter, which was filed with the Superior Court of New Jersey, Law Division, on January 22, 1974, sought a declaration that chapter 363 is violative of the United States and New Jersey Constitutions and temporary and permanent injunctive relief restraining the Department of Environmental Protection from enforcing the legislation (App. 82-104). The case was brought before the trial court on cross-motions for summary judgment.

In support of the State's cross-motion for summary judgment, a report was submitted, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management," which appropriately describes the crisis in solid waste disposal leading to the enactment of the ban on the dumping of waste originating out of state:

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating.
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> • • •

> "There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered 'marginal.' Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.
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> • • •
>
> "Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequently likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill 'sponge.'
>
> "Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the

waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

• • •

"While examples of leaching sanitary landfills have been studied and documented for many years, only recently have researchers begun to study leachate generation in detail. As recently as 1972, the U.S. Environmental Protection Agency, in its report entitled 'Sanitary Landfill Design and Operation,' stated the following:

> 'Some investigators believe that even in a sanitary landfill, leachage production is inevitable and that some leachate will eventually enter surface water or groundwater. This has not been proven but neither has the opposite view. The present philosophy held by the Office of Solid Waste Management Programs, most State solid waste control agencies, and many experts in the field is that through sound engineering and design, leachate production and movement may be prevented or minimized to the extent that it will not create a water pollution problem.'

"One particularly disconcerting feature of leachate production is the time delay created by the absorptive character of the wastes. Frequently, landfills do not begin leaching until some time after the fill has been completed and the waste has reached its saturation level. Climatic conditions in New Jersey are favorable to leachate production and, unless extreme measures are taken to prevent

any liquid from infiltrating the waste, leachate will be produced in New Jersey's landfills. The problem then becomes one of preventing the pollution of our ground and surface waters by the leachate.

"Water pollution from sanitary landfills is determined by a number of factors, including the site hydrology, geology, topography, method of operation, the type of wastes received for disposal, and other physical and chemical factors which vary from fill to fill. Clearly, then, the potential for polluting our ground and surface water resources should be a strong factor in the selection of a sanitary landfill site, and in its design and method of operation.

• • •

"Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called 'aerobic.' The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

"As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present is methane. Methane is the 'natural gas' commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is no oxygen present, it does not pose an explosive threat in the fill itself. Methane is, however, much lighter than air and,

therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

• • •

"The introduction of bulk liquids into a landfill can greatly affect the generation of leachate within the fill, and leaching from fills which have accepted hazardous wastes can have a particularly devastating effect on the quality of our resources. For these reasons, the proposed regulations would require any sanitary landfill which accepts such wastes to establish and maintain water monitoring facilities, and to undertake immediate corrective measures should the monitoring disclose contamination. Additionally, the proposed regulations would ban the disposal of hazardous wastes and bulk liquids at conventional sanitary landfills after March 15, 1975. This, it is felt, is sufficient lead-time for the construction of recovery, treatment and disposal facilities with sufficient safeguards to properly handle hazardous and bulk-liquid wastes.

• • •

"In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the de-

gradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

"It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

"Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary

landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

"One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal." (App. 149-160).

The extent of the environmental harm and the danger to public health from landfills has been further discussed in a series of affidavits submitted by administrators of the Solid Waste Administration of the New Jersey Department of Environmental Protection. Bernhardt Lind, then Chief of the Bureau of Solid Waste Management, explained:

"At the present time, the only viable method of solid waste disposal that exists in New Jersey is through sanitary landfills. Thus, sanitary landfills are necessary. However, even though they are necessary, they are, at best a necessary evil. Sanitary landfills are a vast improvement over former open and often burning dumps and polluting incinerators. But sanitary landfills have environmental problems all their own. In New Jersey, virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases including methane, the same 'natural' gas used in cooking and heating. It was once believed that solid waste could be used to make swamps into good, usable lands. Examination of terminated landfills reveal that their use for building purposes is not desirable due to the high cost of required pilings and gas accumulation prevention measures. The environmental insults resulting from sanitary landfills demand that the number, size and height of landfills be held to a minimum until such time as viable alternative methods are developed and implemented." (App. 255-256).

Mr. Lind in his affidavit of March 15, 1977 cogently described how waste originating out of state has magnified the scope of these health and environmental problems. After noting that the percentage of the solid waste disposal in New Jersey originating out of state had grown to 20%, Lind concluded:

"The figures above can only be viewed with extreme alarm. For as predicted in previous affidavi's in this matter, expansions of old landfills (both legal and allegedly illegal) have occurred at the expense of scarce rural New Jersey acreage and at at the expense of an increasingly precious rural environment, because the New Jersey landfills simply cannot keep pace with the increasing disposal volume burdening New Jersey while also conforming to public health and safety regulations. For instance, during 1976, plaintiff Fazzio Landfill was closed and during 1977, plaintiff Mac Sanitary Landfill was closed because of environmental (including odor problems) and aesthetic considerations; on the other hand, the loss of volume from these closures

was picked up by other landfills like Kinsley Landfill and Florence Landfill.

• • •

"Further problems exist as a result of the need to open up and expand existing facilities beyond their design capacity. For example, due to the closing of Mac Landfill and Fazzio Landfill, a significantly increased volume of waste is being dumped at Big Hill Landfill. The subsurface geology of this landfill consists primarily of highly permeable sands which could allow dripping and dangerous leachate (a noxious and highly polluted liquid often caused by landfills) as well as methane gases to percolate and flow through the earth's strata and into the important groundwater of the State. Furthermore, expanding existing landfills could lead to increased health hazards caused by rodents, fires and scavenger birds; landfills also, needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems. In fact, citizen complaints regarding noise and odors have been received by DEP regarding Big Hill Landfill and there are also indications that said landfill may be causing water pollution problems in the underlying Cohansey and Kirkwood aquifers. Thus, it can be concluded that the above potential environmental insults demand that New Jersey not perpetuate 'bad' landfills and that the number of landfills be held to a minimum." (Motion for Clarification, etc., at 62sa-65sa).*

* This affidavit, which was inadvertently omitted from the appendix, will be included in a supplemental appendix to be filed by appellants.

On the basis of the cross motions for summary judgment, the trial court concluded that waste is a proper subject of interstate commerce, that chapter 363 discriminates against such commerce and that the statute therefore violates the Commerce Clause (App. 6-13).

On appeal by the State, the Supreme Court of New Jersey found that the objective of chapter 363 was ". . . to prolong the useful lifespan of landfill areas within the state . . ." and thereby serve ". . . the needs of public health as well as endeavoring to preserve the environment." (App. 54). It further found that the legislation did not discriminate against interstate commerce, observing that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions." (App. 55). The court therefore concluded that the Commerce Clause had not been violated: "[W]here the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action (App. 58).

On January 9, 1976, appellants filed an appeal with the Court (App. 303) and on April 5, 1976, probable jurisdiction was noted. 425 U.S. 910 (1976).

At the oral argument on November 3, 1976, the Assistant Attorney General appearing for the State of New Jersey noted in response to a question from Mr. Justice White that twelve days previously the President had signed into law the Resource Conservation and Recovery Act of 1976, which would expand the federal role in dealing with solid waste problems. On February 23, 1977, the Court, with four justices dissenting, issued a per curiam

opinion vacating the judgment of the Supreme Court of New Jersey and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976. *Philadelphia* v. *New Jersey,* 430 U.S. 141 (1977) (App. 59-61).

On the remand, the Supreme Court of New Jersey, by opinion dated June 20, 1977, held that chapter 363 is fully consistent with the Resource Conservation and Recovery Act and again unanimously upheld its validity. *City of Philadelphia* v. *State Dept. of Environ. Protec.,* 73 N. J. 562, 376 A. 2d 888 (1977) (App. 62-74).

Summary of Argument

In New Jersey and elsewhere the government, in discharge of its responsibility to provide for the health, safety and welfare of its people, makes provision for the disposal of waste, either by performing this service itself or by regulating private parties. However, the State and its people pay a social cost for this public service. At the present time the primary means of waste disposal in New Jersey is through landfills. As expressly found by the Supreme Court of New Jersey, landfills present numerous dangers to public health and the environment. Virtually all landfills can be expected to produce leachate, a noxious and highly polluted liquid which contaminates our ground and surface waters. Landfills also generate a mixture of gases which may cause fires and which greatly limit the potential future uses of the land. This means that while landfills are necessary for the disposal of waste generated in New Jersey, they are at best a necessary evil.

Congress, by the enactment of the Resource Conservation and Recovery Act of 1976, has expressly recognized

that waste disposal practices vitally affect public health and the environment and that they should therefore be the subject of comprehensive planning and regulation by government. The Act also recognizes that the problems of solid waste disposal are primarily of local, not national, concern, and that the states have broad discretion in determining the elements of their individual solid waste management planning. Therefore, the legislation does not preclude a state from restricting the use of its landfill space to the disposal of waste generated within the state.

Nor does the Commerce Clause by its own force compel a state which allows land to be used for the disposal of waste generated within its boundaries also to allow land to be used for waste generated in other states. The restriction on the use of New Jersey landfills to wastes generated in the State does not implicate any substantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect. Rather, it represents a proper exercise of the basic power of the State to protect its environment and the health of its inhabitants by reducing the overall volume of waste disposed on land within the state. This conclusion is reinforced by the provisions of the Resource Conservation and Recovery Act which recognize that solid waste disposal should be conducted in accordance with comprehensive government regulation and that it is primarily a subject of local rather than a national concern. Therefore, the Court should affirm the conclusion of the Supreme Court of New Jersey that a state may prohibit the use of its land as a disposal site for waste generated within a political subdivision of another state.

ARGUMENT

POINT I

Since the Federal Resource Conservation and Recovery Act of 1976 expressly recognizes that the disposal of waste on the land may present a danger to public health and the environment and that the states have primary responsibility for planning and management to reduce this danger, the Act permits a state to restrict the use of landfills within its boundaries to the disposal of waste generated in the state.

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests (*Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325 (1973); *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960)) or to protect public health. *Mintz* v. *Baldwin,* 289 U.S. 346 (1933); *Reid* v. *Colorado,* 187 U.S. 137, 147-149 (1902). Therefore, the appellants must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.,* (hereinafter "the Act") pre-empts the New Jersey legislation restricting the use of landfills located within its boundaries to the disposal of waste generated in New Jersey.

The appellants have failed to satisfy that burden, because they have not shown that the Act on its face in any way undermines the validity of the New Jersey legislation. On the contrary, the Act constitutes an express

congressional recognition that the problems of solid waste disposal are primarily of state and local, not national concern. Thus, section 1002(a)(4) (42 U.S.C. §6901(a)(4)) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

> "In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.
>
> "This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.
>
> "Guidelines should provide the States and area planning agencies with maximum flexibility, while assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.
>
> "To assure that the Federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection

> Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request." 122 Cong. Rec. 11069 (1976) (remarks of Senator Randolph).

These views were echoed by Senator Stafford of Vermont (*Id.* at 11071), Senator Baker of Tennessee (*Id.* at 11072) and Senator Dole of Kansas (*Id.* at 11094-11095). No contrary view was expressed. See also S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976).

A review of the individual subsections of the Act also shows that its overall design was to foster the waste disposal programs of the state rather than to pre-empt the field at the federal level. The Act represents a significant new federal commitment to participate in solving the problems of solid waste collection and disposal. However, with limited exceptions discussed below, the Act does not purport to override state legislation dealing with the problems of solid waste management. The Act provides at section 2003 (42 U.S.C. §6913) for the establishment by the Administrator of the Environmental Protection Agency of "Resource Conservation and Recovery Panels", consisting of technical, marketing, financial and institutional specialists, which will have the responsibility of providing "States and local governments upon request with technical assistance on solid waste management, resource recovery and resource conservation." Section 2004

(42 U.S.C. §6914) establishes a program of federal grants to assist private and public purchasers of tire shredders. Section 7007 (42 U.S.C. §6977) authorizes federal grants to train State and local personnel to carry out solid waste and resource recovery programs. Federal funding of research and development and demonstration projects are authorized by section 8001 (42 U.S.C. §6981) and section 8004 (42 U.S.C. §6984). The sections are all elements of an overall congressional design to leave the responsibility for dealing with the problem of solid waste disposal at the state and local level but at the same time to provide federal financial and technical assistance.

The one area in which the Act imposes a direct regulatory responsibility upon the federal government is hazardous waste. The Administrator has the responsibility under section 3001 (42 U.S.C. §6921) for identifying the characteristics of hazardous waste and for listing particular hazardous wastes not later than eighteen months after enactment of the Act. The Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. Section 3002-3005 (42 U.S.C. §6922-6925). The Administrator also may delegate the responsibility for regulation of hazardous wastes to state authorities. Section 3006 (42 U.S.C. §6926).

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of waste originating out-of-state. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of the Environmental Protection Agency of a list of hazard-

ous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months from enactment of the Act within which to promulgate such lists and regulations (and it is anticipated this timetable will be extended), the federal regulation of this area probably will not become operative for at least another six months. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 723-724 (1963); *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 84-85 (1939).

Secondly, and even more importantly, when the federal regulatory program does become operative, it will be limited to "hazardous wastes". This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 3 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." Section 1004(5) (42 U.S.C. §6903(5)).

Furthermore, the Administrator is directed, in listing the "hazardous wastes" which will be subject to federal regulation, to take into account ". . . toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." Section 3001 (42 U.S.C. §6921). It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under sections 3001-3011 (42 U.S.C. §6921-§6931) of the Act. This conclusion is supported by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 16 (1976). Since the New Jersey statute, as limited by its implementing regulations, is primarily directed towards general municipal waste, and since the appellants apparently are engaged solely in the disposal of such waste, the federal regulation of "hazardous waste" would have no effect on the subject matter of the instant appeal.

In addition to providing for direct federal regulation of "hazardous waste", the Act establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. The Act contemplates joint federal-state action to identify regions

appropriate for solid waste planning and to adopt regulations for solid waste management. Section 4002(a) (42 U.S.C. §6942(a)) provides that within 180 days after enactment of the Act, the Administrator ". . . after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which have common solid waste problems and are appropriate units for planning regional solid waste management services." Section 4006(a) (42 U.S.C. §6946(a)) provides that within 180 days after adoption of the federal guidelines, ". . . the Governor of each State, after consultation with local elected officials, shall promulgate regulations based on such guidelines identifying the boundaries of each area within the State which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management." Section 4006(c) (42 U.S.C. §6946(c)) also provides that such regions may embrace more than one state, in which event ". . . the Governors of the respective states . . . shall enter into agreements identifying the boundaries of such region." Section 4006(b) (42 U.S.C. §6946(b)) provides that within a third 180 day period the State shall ". . . (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan and (B) identify which solid waste functions will, under such State plan, be planned for and carried out by the State and which such functions will, under such State plan, be planned for and carried out by regional or local authority or a combination of regional or local and State authorities." Section 4002(b) (42 U.S.C. §6942(b)) provides that eighteen months after enactment of the Act ". . . the Administrator shall, after consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development

and implementation of State solid waste management plans." The Act also authorizes appropriations for solid waste planning for states with a state plan that has been approved by the Administrator. Section 4007(b) (42 U.S.C. §6947(b)).

There is no incompatibility between these provisions and the restriction of the use of landfills located within New Jersey to the disposal of waste originating in the State. The only way chapter 363 could conflict with the Act would be if the plans of New Jersey and its neighboring states included "interstate regions" pursuant to section 4006(c) (42 U.S.C. §6946(c)). However, the "Interim Guidelines" for "Identification of Regions and Agencies for Solid Waste Disposal" adopted by the Administrator on May 16, 1977 (42 Fed. Reg. 24926, 40 C.F.R. §253) do not purport to mandate the establishment of an "interstate region" in any particular area and the Governor of New Jersey, pursuant to section 4006(c), has designated solely intrastate regions. See N.J. Pub. L. 1975, c. 326 (N.J.S.A. 13:1E-1 *et seq.*). There is thus no conflict between the Act, at least as presently administered, and the restriction by New Jersey of the use of its landfills to waste originating in New Jersey. Therefore, as in *Askew* v. *American Waterways Operators, Inc.*, supra, at 336 ". . . it will be time to resolve any such conflict between federal and state regimes when it arises."

Furthermore, the planning provisions of the Act are clearly intended to be voluntary. The first section of the planning subchapter states that its "objectives . . . are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage resource conservation . . . through Federal technical and financial assistance . . . designed to foster cooperation among Federal, State, and local gov-

ernment and private industry." Section 4001 (42 U.S.C. §6941). This language clearly contemplates voluntary undertakings, rather than mandatory obligations. The voluntary nature of the planning provisions of the Act is also evident in the specific section dealing with "interstate" regions, which states that the establishment of these regions shall be by "agreement of the respective governors. Furthermore, there is no provision for the Administrator imposing an interstate plan in the event the governors fail to agree.[1]

The intent of Congress to make interstate regional planning voluntary is confirmed by the numerous statements in the legislative history that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans." S. Rep. No. 94-988, 94th Cong., 2nd Sess. 11 (1976). See also 122 Cong. Rec. 11069 (1976) (comments of Senator Randolph); *Id.* at 11071 (comments of Senator Stafford); *Id.* at 11072 (comments of Senator Baker); *Id.* at 11094-11095 (comments of Senator Dole).[2]

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[1] The essentially voluntary planning provisions of the Resource Conservation and Recovery Act are dramatically different from the mandatory planning provisions of the Clean Air Act, as amended in 1970. Pub. L. 91-604, 42 U.S.C. §1857-1858a. See *The Clean Air Amendments of 1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?* 11 Harv. Civil Rights-Civil Liberties L. Rev. 701 (1976). If it were possible to read the planning provisions of the Resource Conservation and Recovery Act as mandatory, a substantial question would be presented as to whether Congress has the authority to impose mandatory planning obligations upon the states in the environmental area. *Cf. EPA* v. *Brown,* 431 U.S. 99 (1977); *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

[2] One exception to the general design of local option with respect to state plans is the requirement that open dumps be eliminated. See section 4005 (42 U.S.C. §6945).

This point is stated with particular clarity in the Report of the House Commerce Committee:

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.
>
> "Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

Therefore, even if the guidelines promulgated by the Administrator under section 4002(a) (42 U.S.C. §6942(a)) were at some later date to suggest the appropriateness of an interstate region encompassing New Jersey, the Governor of New Jersey still will have the option whether to agree to such a plan.

In any event, assuming arguendo that the Act could be read to impose mandatory obligations upon the respective states to participate in interstate planning, chapter 362 would not stand as an obstacle to compliance with that obligation. *Cf. Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977). Chapter 363 does not by its terms preclude the

Governor of New Jersey from conferring with the governor of a sister state regarding regional solid waste planning. And if the procedures of the Act eventually were to result in an agreement between the governors which was inconsistent with a total ban on the disposal in New Jersey of out-of-state waste, this could be easily implemented, as found by the Supreme Court of New Jersey (App. 72-73), through a further exercise by the Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." N.J.S.A. 13:11-10. Furthermore, an authorization resulting from bilateral discussions between the responsible officials of the two states to dispose of waste originating out-of-state in New Jersey would be significantly different from Philadelphia's unilateral decision to use New Jersey as its disposal site. Such authorization undoubtedly would be the product of a careful and coordinated evaluation of the disposal needs and the environmental and health concerns of the two states rather than the unplanned result of certain New Jersey entrepreneurs seeking to maximize profits without regard to the health and environmental concerns of the rest of the citizenry.

Finally, it should be noted that the Solicitor General, on behalf of the United States as *amicus curiae,* has taken a firm position that the Act does not pre-empt chapter 363. In his memorandum on the application for stay pending appeal, the Solicitor General stated:

> "We think that the Act's full purposes may be achieved whether or not New Jersey accepts waste from other States, at least in the absence of any experience or regulations establishing the presence of a hindrance.
>
> • • •

> "[T]he explicit provision for partial preemption in section 3009 strongly suggests that no further preemption is intended.
>
> • • •
>
> "The fact that Subchapter IV is no more than a method of providing federal assistance to cooperating States indicates that Congress did not intend to bring coercive pressure to bear upon the State or to oust any of their laws."[3]

If there were any doubt concerning the intent of Congress to permit the states to implement regulatory provisions such as chapter 363, the position of the United States Government, as expressed through the Solicitor General, should tip the balance in favor of finding that chapter 363 is fully consistent with the legislative scheme envisioned by Congress. *Cf. EPA* v. *Brown,* 431 U.S. 99, 103 (1977); *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682, 696-697 (1976); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 420-421 (1973); *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971).

Therefore, the enactment of the Resource Conservation and Recovery Act of 1976 does not in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy, but instead the discharge

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[3] Obviously, the brief filed by the Solicitor General represents the authoritative statement of the United States Government as to the compatibility of chapter 363 with federal legislation. Therefore the contrary statement four years ago by a middle echelon official of EPA, set forth at pp. 133-136 of the appendix and heavily relied upon in appellants' brief, should be disregarded.

by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use.

POINT II

The requirement that the use of landfills within a state be restricted to the disposal of waste generated in that state falls within the basic power of the state to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause of the United States Constitution.

It has been well established at least since *Cooley* v. *Board of Wardens,* 12 How. 299 (1851) that the Commerce Clause not only provides an affirmative grant of authority to Congress, but also ". . . even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946). It is equally well established, however, ". . . that under our constitutional scheme the States retain 'broad power' to legislate protection for the citizens in matters of local concern such as public health, . . ." *Great A.&P. Tea Co.* v. *Cottrell,* 424 U.S. 366, 371 (1976). As the Court noted in *H. P. Hood & Sons* v. *DuMond,* 336 U.S. 525, 533 (1949), "[the] distinction between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." The local concerns over which the states retain comprehensive authority, even when interstate commerce may be affected, include protection of the environment. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960); *cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

The Court frequently has been confronted with challenges to state legislation which furthered legitimate local interests but simultaneously imposed a significant burden upon interstate commerce. In such cases, ". . . the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' . . . thereby attempting 'the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce.'" *Great A. & P. Tea Co.* v. *Cottrell, supra,* at 928. The leading cases in this area well illustrate how delicate this process of accommodation has been. Thus, in *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959), the Court found the Commerce Clause to be violated by a statute requiring a particular type of rear fender mudguard on trucks and trailers operated within a state, but in *South Carolina State Highway Dep't* v. *Barnwell Bros.,* 303 U.S. 177 (1938) it sustained state limitations on the weight and width of trucks and trailers. In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), the Court held state statutes imposing limitations on the length of freight cars to be violative of the Commerce Clause, but it has consistently sustained state full crew laws. See *e.g. Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co.,* 393 U.S. 129 (1968). And in *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951), the Court held the Commerce Clause to be violated by an ordinance which prohibited the sale of milk in a municipality unless it had been pasteurized and bottled at an approved plant located within five miles of the municipality, but in *Milk Control Board* v. *Eisenberg Farms Products,* 306 U.S. 346 (1939), it sustained a statute requiring interstate milk dealers to keep records, to

post a bond to guarantee prompt payment to purchasers and to pay minimum prices to producers. Although the results varied, the Court was confronted in all these cases not only with a legitimate local interest but also an indisputable burden upon the open national market which the Commerce Clause was designed to protect. Therefore, it carefully scrutinized any burdens on the free flow of interstate commerce with the consequence that any discrimination against interstate transactions almost invariably resulted in a declaration of invalidity.

There have been other cases, however, in which no substantial interests in national commerce were implicated and local concerns were paramount. The Court has sustained state legislation under such circumstances without engaging in the delicate process of balancing required when ". . . regulation of local matters may also operate as a regulation of commerce . . . ." *Southern Pacific Co.* v. *Arizona, supra,* at 768. *Cf. Wilson* v. *The Blackbird Creek Marsh Co.,* 2 Pet. 245 (1829). Local interests are most clearly paramount in preventing the transportation into a state of articles which are inherently injurious to public health, safety and welfare. As the Court stated in *Sligh* v. *Kirkwood,* 237 U.S. 52, 60 (1915):

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well-established. Such articles, it has been declared by this Court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. 'Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate

> sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.
>
> "'Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . . .'" 237 U.S. at 60 (citations omitted).

To the same effect, the Court said in *Pike* v. *Bruce Church,* 397 U.S. 137, 143-144 (1970):

> "[T]o the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.'"

This principle was applied in *Clason* v. *State of Indiana,* 306 U.S. 439, 442-443 (1939), where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. The Court, relying on *Sligh,* recognized that the statute was "a sanitary and health measure not intended to cause discrimination against or to burden interstate commerce. . . ." 306 U.S. at 443. The Court emphatically stated:

> "Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators

who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.

"We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.

"There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-444.

See also *Price* v. *Illinois,* 238 U.S. 446 (1915); *The Minnesota Rate Cases,* 230 U.S. 352, 406-408 (1913); *Asbell* v. *Kansas,* 209 U.S. 251 (1908); *Rasmussen* v. *Idaho,* 181 U.S. 198 (1901).

It is clear that the prohibition against the disposal within New Jersey of waste originating out of state falls within the basic power of the State to protect its environment and the health of its inhabitants and thus does not violate the Commerce Clause. It does not matter whether it is found that waste intended for disposal is not a legitimate item of commerce (*Clason* v. *Indiana, supra*) or that environmental and health concerns of the

State are paramount to the commercial interests of the appellants. *Cf. Robertson* v. *California,* 328 U.S. 440, 458-459 (1945). The conclusion is the same. As stated by the Supreme Court of New Jersey, ". . . where the effect upon trade and commerce is relatively slight, . . ." and ". . . where at the same time the values sought to be protected by the state legislation are . . . crucial to the welfare of its citizens . . .", there should be ". . . no hesitancy in sustainnig the state action." (App. 58).

The transportation and disposal of waste is vastly different from the commerce in which the Founding Fathers sought to maintain an open national market. The appellants' business does not involve the sale of a product or resource, such as milk, *H.P. Hood & Sons, Inc.* v. *DuMond, supra,* natural gas, *Pennsylvania* v. *West Virginia, supra; West Kansas Natural Gas Co., supra,* or livestock, *Brimmer* v. *Rebman,* 138 U.S. 78 (1891); *Railroad Co.* v. *Husen,* 95 U.S. 465 (1877). Nor does it involve an instrumentality of national commerce, such as railroads, *Brotherhood of Loc. F & E* v. *Chicago, R.I. & P.R.R. Co., supra,* or highways, *Bibb* v. *Navajo Freight Lines, supra.* Rather, their business involves the fundamental responsibility of government, under the police power, to provide for the disposal of waste generated by its inhabitants. *Clason* v. *Indiana, supra; Cf. Nat'l League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Furthermore, the sole purpose and effect of the statute is not economic protectionism but rather to further the health and environmental interests of the State. No New Jersey commercial interests stand to gain advantage over competitors from outside the state as a result of the ban on dumping out-of-state waste. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests, but rather

that it has denied a small group of its entrepreneurs an economic opportunity to traffic in waste in order to protect the health, safety and welfare of the citizenry at large. *Clason* v. *Indiana, supra.* The ban on dumping out-of-state waste therefore does not implicate any substantial national interest in the maintenance of an open economy which the Commerce Clause was designed to protect.

On the other hand, the ban does serve a vital local interest in the preservation of the state's environment and the health of its inhabitants. There is a solid waste crisis in New Jersey. The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 declares:

> "The Legislature finds and determines that since the enactment of P.L. 1973, c. 39 (C. 13:11-1, et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited."

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

"The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean,* 64 N.J. 190, 193, 314 A. 2d 65 (1974).

• • •

"Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

• • •

"Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw* v. *Byram Township,* 86 N.J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N.J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> "• • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill op-

erations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority* v. *Hackensack Meadowlands Development Commission,* 120 N.J. Super. 118, 122 (App. Div. 1972); emphasis in original]'

"We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy." (App. 38, 40, 51-52).

These legislative and judicial findings are solidly grounded on the Basis and Background Statement of the New Jersey Department of Environmental Protection, quoted in the Counterstatement of the Case, and the report of the State of New Jersey County and Municipal Government Commission, entitled *Solid Waste: A Coordinated Approach* (1972), of which judicial notice was taken by the Supreme Court of New Jersey (App. 40). Since there is a reasonable basis in the record for the findings of the New Jersey Legislature and the Supreme Court of New Jersey, they should be accepted on appeal by the Court. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952); *Welch* v. *Swasey,* 214 U.S. 91 (1909). As the Court noted in *Evco* v. *Jones, supra,* the factual findings of a state

supreme court will be re-examined only in "exceptional circumstances." No showing of such "exceptional circumstances" has been made in this case.

On the contrary, the general literature on the subject, of which the Court can and should take judicial notice (*Parker* v. *Brown,* 317 U.S. 341, 363 (1943); *Sligh* v. *Kirkwood, supra,* at 61; see also Davis, *A System of Judicial Notice Based on Fairness and Convenience,* Perspectives of Law 69 (1964)), fully corroborates the findings of the Supreme Court of New Jersey concerning the danger to the environment and public health from landfills.[4] It has been widely recognized that landfills are unsightly, a source of noxious odors and vermin and, with

[4] *Gas and Leachate from Landfills: Formation, Collection and Treatment,* Proceedings of a Research Symposium held at Rutgers University, U. S. Environmental Protection Agency, March 1976 (hereinafter *Gas and Leachate*); Esmaile, Houshang, "Control of Gas Flow from Sanitary Landfills," *Journal of the Environmental Engineering Division,* Proceedings of the American Society of Civil Engineers, Vol. 101, EE4, August 1975 "hereinafter *Control of Gas Flow*"; *Hazardous Waste Disposal Damage Reports,* U.S. Environmental Protection Agency, Office of Solid Waste Management Programs, June 1975; Schmalensee, Richard, Ramachandra Ramarathan, Wolfhard Ramm and Dennis Smallwood, *Measuring External Effects of Solid Waste Management,* U. S. Environmental Protection Agency, March 1975 (hereinafter *Measuring External Effects*); Blannan, Janet and Mirdza Peterson, "Survival of Fecal Coliforms and Fecal Streptococci in a Sanitary Landfill," *News of Environmental Research in Cincinnati,* U. S. Environmental Protection Agency, April 12, 1974 "hereinafter *Survival of Fecal Coliforms*"; Miller, David, Frank DeLuca and Thomas Tessier, *Ground Water Contamination in the Northeast States,* U. S. Environmental Protection Agency, June 1974 (hereinafter *Ground Water Contamination*).

the introduction of heavy machinery, exceedingly noisy.[5] It is also now known that landfills are almost certain sources of ground and surface water pollution,[6] that they produce dangerous gases as a byproduct of both aerobic

[5] "Noise at sanitary landfill sites is generated by the unloading of refuse, including the operation of compactor and transport trucks as they disgorge their cargoes and the constant operation of the heavy equipment used for spreading, compacting, and covering the refuse." *Measuring External Effects, supra* at 219.

Since powerful machinery is required for spreading and compacting in order to reduce vermin, odors and later land settling, noise is a major problem, especially for landfills located in residential areas.

[6] In *Ground Water Contamination, supra,* an evaluation of water contamination in 11 northeast states including New Jersey, the authors consider that the hundreds of reported cases of such contamination represent only a small fraction of the actual pollution present. They conclude that:

> "The thousands of acres of landfills containing municipal and industrial solid wastes are an almost universal source of ground-water contamination in the region." *Id.* at 1.

Though new landfill developers in New Jersey are attempting to install liners and to treat the leachate collected, "little experience exists with regard to the various methods that might be successful in the handling of this complex fluid." *Id.* at 208. It is felt that state regulations are helpful but that the true characteristics of leachate from the various types of landfills, the ability of soils to reduce the concentration of pollutants and the effects of cover materials at landfill sites are not sufficiently understood. The technology

> ". . . for eliminating the landfill as a continuing source of contamination (has) not been developed, and, because of this, there do not appear to be any clear-cut guidelines or policies that can be followed." *Id.* at 218.

and anaerobic decomposition[7] and that they are severely limited as to potential use when completed.[8] The standards originally set for the operation of sanitary landfills (daily compaction and soil cover) are understood today to be inadequate. Attempts to minimize the "leaching" of organic and inorganic pollutants from landfill sites

[7] All landfills (sanitary or otherwise) produce gases—initially carbon dioxide and later, as the oxygen level decreases, methane. "[T]he greater the quantity, putrescibility, moisture content and temperature of the refuse . . . the higher the rate of gas production within the landfill." *Measuring External Effects, supra* at 326.

Completed landfills are not easily converted into safe building sites although gas vents have been used with limited success for controlled escape and burning.

> "The problems of fire and explosion hazards from landfills occur when methane gas . . . seeps into enclosed areas such as adjacent sewer lines or the foundations of buildings located above the fill. . . . Methane seepage from completed landfills is both inevitable and sufficiently abundant to produce a significant hazard." *Id.* at 238, 239.

The authors discuss a study of gas seepage in a 29 building public housing project constructed on fill. Within 21 months after construction explosive mixtures of methane were found in crawl spaces below two of the buildings in the development. As attempts to seal the foundations proved unsuccessful it became necessary to install automatic ventilation equipment, especially since the methane accumulation had rapidly increased during the sceond and third years of monitoring.

[8] Fill materials slowly decompose causing a gradual shifting and settlement over the extent of a given site. Many factors are involved: the weight and composition of the fill, the weight of cover materials, the amount of rainfall and, if the land is used for construction, the weight of the structure placed there. Since a number of these factors are unpredictable (the diverse nature of fill materials for example) "landfills are a particularly poor foundation material for construction". *Id.* at 259.

through the use of liners are still in the experimental stage.[9] Many have been found faulty. Attempts have been made to vent accumulated gases but the danger of fire and explosion has not been eliminated.[10]

The generally recognized fact that solid waste disposal poses substantial dangers to the environment and public health was also expressly acknowledged by Congress in the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.* Thus, section 1002(b) (42 U.S.C. §6901(b)) states:

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[9] Haxo, Henry E., Assessing Synthetic and Admixed Materials for Lining Landfills," *Gas and Leachate, supra,* 130. In *"Survival of Fecal Coliforms," supra,* the authors conclude that pathogenic microorganisms may be "transmitted into the environment through the leaching process" past an eighteen inch clay soil liner (considered reasonably "safe" by many experts in the field). *Id.* Even where leachate is collected for treatment, inert organic matter and totally dissolved inorganic solids cannot easily be removed. See Pohland, Frederick G., "Landfill Management with Leachate Recycle and Treatment: An Overview," *Gas and Leachate, supra,* 159.

[10] Flower, Franklin, "Case History of Landfill Gas Movement Through Soils," *Gas and Leachate, supra,* 177, and "Control of Gas Flow," *supra* at 555. "Case History" describes the death of peach trees in commercial orchards in Glouchester County, the death of ornamental vegetation and the entry of combustible gases into private homes in Camden County and the destruction of farm crops in Burlington County. The author comments, "Sometimes gas vents prevent the lateral migration (of possibly flammable gas) and sometimes they do not." *Id.* at 188.

Also, in *Hazardous Waste Disposal Damage Reports,* compiled by the U.S. Environmental Protection Agency's Office of Solid Waste Management Programs, *supra,* the agency describes three separate instances of waste disposal practices which resulted in arsenic poisoning, the destruction of farmland and, in New Jersey, the death of a bulldozer operator.

"ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—

"(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

"(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

"(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

"(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

"(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

"(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable

solid waste disposal sites within five years unless immediate action is taken; . . . ."

Significantly, the appellants do not directly challenge the factual finding of the Supreme Court of New Jersey that landfills pose a serious threat to public health and the environment. Rather they seek to satisfy the burden imposed by *Evco* v. *Jones, supra,* by simply describing the web of federal and state statutes and regulations which address the problems of waste disposal (Appellants' brief, pp. 45-58). However, no responsible authority asserts that these measures are likely in the foreseeable future to eliminate the health and environmental problems of waste disposal, any more than the extensive federal and state efforts in the field of law enforcement are likely to eliminate crime. On the contrary, the voluminous statutory and regulatory provisions cited by appellants, the congressional reports on the bills enacted as the Resource Conservation and Recovery Act of 1976 and the congressional findings set forth in the Act, all attest in dramatic terms to the fact that the country is far away from a point where it accurately can be said, as urged by appellants, that the disposal of waste poses no real health or environmental problems.

The appellants also point to statements that chapter 363 was enacted to preserve available landfill space for the disposal of New Jersey waste and seek to infer that the legislation was not designed to serve health or environmental interests of the State. Initially, it should be noted that appellants have failed to cite any authority for the proposition that the Commerce Clause disables a state from enacting legislation to limit an activity which has a deleterious impact on land use. *Cf. Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *American Can Co.* v. *Oregon Liquor Control Com'n,* 15 Ore. App.

618, 517 P.2d 691 (1973). In any event, the landfill preservation, and health and environmental objectives of chapter 363 cannot be rigidly separated in the manner assumed by appellants' argument. It is at precisely the point when existing capacity has been exhausted that landfills present the most severe threat to public health and the environment. As noted by the Supreme Court of New Jersey, even at the present time ". . . many landfills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands." (App. 40). It is clearly desirable to discontinue or at least to limit the use of such landfills. However, the plain fact is that the exhaustion of available landfills space through overutilization increases the risk that disposal in the most environmentally sensitive areas will have to be increased. As noted by the Supreme Court of New Jersey, ". . . it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes." (App. 43). In short, there is a direct and immediate relationship between the legislative objectives of preserving existing landfill space for the maximum period possible and minimizing the health and environmental dangers of landfills.[11]

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[11] Although this claim was nowhere made in their previous briefs filed with the Court, appellants have now asserted that the motivation for enactment of chapter 363 was economic rather than environmental. This belated assertion is frivolous. The primary authority for the assertion is a press release by the then Acting Governor which the appellants apparently located in the archives of the New Jersey State Library in Trenton, New Jersey. Initially, it should be noted that this document is not part of the record. In any event, the part

(Footnote continued on following page)

Therefore, the appellants have failed to set forth any grounds for questioning the findings of the New Jersey Legislature and Supreme Court of New Jersey that the disposal of waste in landfills represents a present threat to the health and environment of the inhabitants of New Jersey.

It also is fully consistent with the Commerce Clause to deal with this problem by taking reasonable steps to reduce the overall volume of waste being disposed on New Jersey land. Thus, in *Bradley* v. *Public Utility Com'rs,* 289 U.S. 92 (1933), the Court rejected a Commerce Clause challenge to the denial by the Ohio Public Utilities Commission of a certificate of convenience and necessity to operate an interstate bus route based upon the fact that the highway over which the service was to be conducted was already overly congested. In a unanimous opinion written by Justice Brandeis, the Court said that "[s]afety may require that no additional vehicle be admitted to the highway" (289 U.S. at 96), even though the effect was to absolutely prevent the operation of the proposed new interstate bus route. If such a restriction may be im-

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(Footnote continued from preceding page)

of that document selectively quoted in the text is strikingly different from the full document, quoted in footnote 10 of appellants' brief, which leaves no doubt that the essential purpose of the bill was protection of the New Jersey citizenry from the grave environmental and health dangers caused by the land disposal of waste. The quotes attributed to the sponsor of A-1132 and former Governor Cahill on pp. 7-8 of appellants' brief and the selections from the Pereira deposition (App. 181-187) have been similarly pulled out of context. Finally, a reading of the entire Basis and Background Statement (App. 148-166), rather than simply the short passage quoted by appellants, leaves no doubt that the essential objectives of the State in the enactment of chapter 363 and the implementing regulations was the protection of public health and the environment.

posed on a basic instrumentality of interstate commerce, it follows *a fortiori* that the transportation into a state of waste intended for dumping may be prohibited so as to reduce the overall magnitude of an established public health and environmental problem.

This case is similar in many respects to *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976). *Hughes* involved the environmental hazard of disposing of abandoned automobiles; this case deals with the environmental hazard of disposing of all forms of solid wastes. In *Hughes,* the State of Maryland pursued its environmental interests in part by a statutory system of bounties designed to encourage the recycling of abandoned automobiles. To prevent state funds from being dissipated by payments for automobiles abandoned in other states, it enacted amendments which had the practical effect of restricting the bounties to Maryland processors. This made it economically impractical for out-of-state processors to compete with Maryland processors in the purchase of abandoned automobiles from wreckers thereby substantially reducing this form of interstate commerce. The Court upheld this legislation essentially on the theory that the payment of bounties by the State to further its environmental interests was not the kind of action with which the Commerce Clause is concerned. Since New Jersey has pursued its environmental interests in limiting the ruin of its land by landfill operations by prohibiting the transportation into New Jersey for disposal of waste originating out of state, rather than expending state funds for this purpose, the subsidy rationale of *Hughes* is not directly applicable. However, the underlying purpose ". . . of protecting the State's environment" (*Id.* at 809) is common to the two statutes, and there are a number of significant respects in which the New Jersey statute implicates the free market principles of the Commerce

Clause to a lesser extent than did the Maryland statute. First, whereas the Maryland statute confers an economic advantage upon Maryland processors to the detriment of out-of-state processors, the New Jersey statute creates no economic preference for local economic interests. On the contrary, some of the appellants are New Jersey landfill operators who claim that they will lose business as a result of New Jersey's effort to protect its environment. Secondly, whereas the recycled scrap metal affected by the Maryland statute was indisputably an appropriate subject of interstate commerce, the New Jersey statute does not affect any materials intended for re-cycling but rather is limited to the disposal of waste.[12] Finally, whereas it was cogently argued in *Hughes* that Maryland's environmental interests could be pursued equally effectively with less impact upon interstate commerce, there is no reasonable alternative available to New Jersey to reduce the overall quantity of waste being dumped within its borders. Therefore, the exclusion of out-of-state waste transported for disposal within New Jersey is more clearly compatible with the free market objectives of the Commerce Clause than the program of economic subsidization for the recycling of abandoned automobiles upheld in *Hughes* v. *Alexandria Scrap Corp.*

Finally, even if there were some doubt concerning the compatibility of chapter 363 with the Commerce Clause,

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[12] Appellants argue that chapter 363 on its face purports to be a prohibition on the entry of all solid and liquid wastes (except garbage for swine) for any purpose whatsoever. However, the Supreme Court of New Jersey recognized that the statute must be read with the regulations promulgated pursuant thereto prior to its effective date as only applicable to waste destined for disposal. The Court is bound by this interpretation of chapter 363 of the Supreme Court of New Jersey. *Smiley* v. *Kansas,* 196 U.S. 443, 455 (1904).

that doubt would be put to rest by the fact that Congress has recently enacted comprehensive legislation dealing with the problems of solid waste disposal without undertaking to force states to allow their land to be used for the disposal of waste originating out of state. It is firmly established that "Congress has . . . power to define the distribution of power over interestate commerce." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507, 521 (1947). See also *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946); *Parker* v. *Brown,* 317 U.S. 341 (1943); *In re Rahrer,* 140 U.S. 545 (1891). As discussed in greater detail in Point I, the Resource Conservation and Recovery Act represents a clear congressional determination that the problems of waste disposal are primarily of local rather than national concern, thus strongly supporting the conclusion that waste disposal is a subject within the local police power which does not implicate any substantial national interest in the maintenance of an open economy. Furthermore, the Act expressly recognizes that solid waste should only be disposed on the land in accordance with careful governmental planning and management at the state and local level, thus supporting the conclusion that patterns of waste disposed are too important to public health and the environment to be left to the unregulated whims of the marketplace. The Act thus reinforces the conclusion that chapter 363 is consistent with the Commerce Clause.

The appellants, in seeking to avoid the line of cases holding that the Commerce Clause does not prevent the states from enacting legislation to protect the health, safety and welfare of their citizens, rely on cases which have no bearing upon the restrictions which the Commerce Clause places on the states, but deal instead with the breadth of the power which the clause confers upon

Congress. See *e.g. United States* v. *Pennsylvania Refuse Removal Association,* 242 F. Supp. 794 (E.D. Pa. 1965), aff'd 357 F. 2d 806 (3rd Cir. 1966), cert. den. 384 U.S. 961 (1966). Thus, the Court has held that Congress has the power under the Commerce Clause to enact legislation prohibiting the interstate transportation of prostitutes (*Hoke* v. *United States,* 227 U.S. 308 (1913)) and kidnapped persons. *Gooch* v. *United States,* 297 U.S. 124 (1936). However, it would be ridiculous to suggest that the Commerce Clause may be invoked to prevent action by the states to combat these evils. Therefore, although *United States* v. *Bishop Processing Company,* 287 F. Supp. 624 (D. Md. 1968), *aff'd* 423 F.2d 469 (4th Cir.), *cert. den.* 398 U.S. 904 (1970), recognized that the movement of air pollutants across state lines provides an adequate jurisdictional basis under the Commerce Clause for the enactment of the Clean Air Act (42 U.S.C. §1857, *et seq.*), this does not mean that the Commerce Clause would present an obstacle to the enactment of legislation by New Jersey to prevent all of Pennsylvania's air pollution from being collected and shipped to New Jersey for release on the property of a well-paid entrepreneur. Similarly, if the ships in *Huron Portland Cement* v. *City of Detroit,* 362 U.S. 440 (1960) were collecting all of the smoke which was produced while steaming the Great Lakes and were releasing it in Detroit Harbor, an ordinance prohibiting such a practice would not be struck down by the Court. The cases dealing with the reach of congressional power under the Commerce Clause are thus inappropriately relied upon by the appellants. *Cf. Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 282 n. 17 (1977); *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 57-58 (1911).

The appellants also rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania* v.

West Virginia, 262 U.S. 553 (1923); *West* v. *Kansas Nat. Gas Co.,* 221 U.S. 229 (1911). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania* v. *West Virginia,* "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Furthermore, it is clear that natural resources such as oil and gas, are located in some states but not in others, and that restrictions upon interstate commerce in resources would have an adverse impact upon the national economy. See *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U.S. 229, 255 (1911). No comparable claim can be made with respect to the disposal of waste. It is also clear that disposal of waste presents immediate problems with respect to health and environment which were not present in the "natural resource" cases. Therefore, these cases involve, under the analysis contained in *H.P. Hood & Sons* v. *DuMond, supra,* state regulation to ". . . constrict the flow of . . . commerce for [local] economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533.

It is also significant that Pennsylvania does not take the same cavalier attitude towards the health and environmental dangers of landfills manifested by Philadelphia's brief when the landfills are located on the Pennsylvania side of the border. On the contrary, Pennsylvania law leaves political subdivisions of that state free to exclude waste originating outside of their boundaries. As stated in the affidavit of the Commissioner of Streets of the City of Philadelphia:

> "13. Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively em-

> powered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever." (App. 221;[13] See also App. 249-252).

The appellant Pennsylvania political subdivision is thus in the anomalous position of invoking the Commerce Clause as a sword to force New Jersey to accept its waste in an effort to solve disposal problems caused by the laws of its own state which allow the immediately surrounding Pennsylvania political subdivisions to exclude Philadelphia waste.[14] This circumstance serves to underscore the fact that what is involved in this case is not preservation of an open national economy but an attempt by a political subdivision of one state to use the soil and environment of a sister state in the discharge of its obligation under the police power to provide for the disposal of the waste of its inhabitants. *Clason* v. *Indiana, supra.*

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[13] By contrast, New Jersey has comprehensive legislation regulating disposal of waste which prohibits one political subdivision from excluding solid waste originating in another political subdivision. N.J.S.A. 48:13A, *et seq.* (Solid Waste Utility Control Act, 1970); N.J.S.A. 13:1E-1, *et seq.* (Solid Waste Management Act of 1970); See *So. Ocean Landfill* v. *Mayor & Coun. Tp. of Ocean,* 64 N. J. 190, 314 A2d 65 (1974).

[14] As in Pennsylvania, the majority of states permit local political subdivisions to prohibit the disposal of waste originating outside of their boundaries. Since such local ordinances may be effectively used to exclude waste originating out of state, the statement in appellants' brief to the effect that only seven states prohibit the disposal of waste originating out of state (appellants' brief, at 33, n. 26) is quite misleading. In fact, the need for such provisions probably only arises in states such as New Jersey which have enacted legislation providing for intrastate regional waste disposal planning.

Indeed, where efforts by one state, or its political subdivisions, to dispose of waste in a manner harmful to the inhabitants of another state have come before the Court, it has not been the disposing states which have sought to invoke the Commerce Clause as a license for the exportation of their waste problems, but rather the recipient states that have brought original actions, often successfully, against the disposing states to prevent actions harmful to their health and environment. See, *e.g., Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *New Jersey* v. *New York City,* 283 U.S. 473 (1931); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208 (1901). The Court in *Georgia* v. *Tennessee Copper Co., supra,* in granting an injunction to prevent a Tennessee company from discharging noxious gas from its factory into Georgia, appropriately noted that:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards should not be endangered from the same source." 206 U.S. at 238.

If conduct offensive to New Jersey took place solely in Pennsylvania as, hypothetically, by the appellants projecting their waste across the Delaware River into New Jersey, it would require such an action for New Jersey to protect the interests of its inhabitants. However, since

the actual method of the disposal of Pennsylvania waste in New Jersey involves conduct within the jurisdiction of New Jersey, it was able to deal with the problem directly through prohibitory legislation. In any event, the point is that actions by one state which adversely affect the air, land and water of another state have never been conceived to be protected by the Commerce Clause.

In sum, this case simply does not involve the national interest in the maintenance of an open economy which the Commerce Clause was designed to protect. Rather, it involves the fundamental responsibility of a state to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use. Therefore, the Court should affirm the conclusion of the Supreme Court of New Jersey that a state may prohibit the use of its land as a disposal site for waste generated within a political subdivision of another state.

POINT III

The record before the Supreme Court of New Jersey provided a reasonable basis for sustaining the legislative finding that the public health and environmental problems caused by landfills are exacerbated by forcing New Jersey to accept waste generated out of state and thus there was no need for a plenary hearing before the trial court.

Appellants' final argument is that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied them due process of law. This contention is frivolous.

It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment ". . . only upon the issues of federal preemption and discrimination against interstate commerce . . ." (App. 189) and the State cross-moved for summary judgment. Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact upon public health and the environment, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On the appeal by the State to the Supreme Court of New Jersey, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious question was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. Nor did the appellants pursue, as alternative grounds

for affirmance, any of the other legal theories which had been projected in shot gun form in their original complaint.[15] Rather, it was only after the Supreme Court of New Jersey had issued its opinion upholding the constitutionality of chapter 363 that the appellants, on a motion for remand to the trial court, first raised questions concerning the finality of the judgment (App. 216-218). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 299). Therefore, assuming that any facts remained to be heard, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice. As conceded by counsel for appellants at the prior oral argument before the Court, the appellants thus waived any right they might have had to pursue other counts of their original complaint (Transcript, p. 25).

There is, therefore, absolutely no factual basis for the appellants' contention that they were denied due process of law by the course of proceedings in the state courts.

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[15] It is well established under New Jersey practice that a judgment may be supported on appeal not only on the grounds relied by the lower court but on any other grounds which will support the result. *Irving Isko* v. *Planning Bd. of Tp. of Livingston*, 51 N. J. 162, 175. 238 A2d 457, 464 (1968). It is also a fundamental policy of state judicial administration that all aspects of a controversy should be joined together in a single legal proceeding so as to avoid the delay and wastage incident to the fragmentation of litigation. *Falcone* v. *Middlesex County Med. Soc.*, 47 N. J. 92, 219 A2d 50 (1966). This means that where feasible a party who has prevailed in a lower court on one of several alternate theories should present any theory which might support the judgment to an appellate court.

Rather, the appellants properly may be bound to the record as they elected to develop it in the state courts. As the court stated in *Reid* v. *Colorado*, 187 U.S. 137, 152 (1902) in a related context:

> "The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the state to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the state enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.
>
> "As therefore, the statute . . . only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish."

Appellants' explanation for their failure to pursue the remand to the trial court is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not

in their strategic best interest to continue with state court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited under 28 U.S.C. §1257(2) to final judgments. Therefore, if there were any substance to appellants' argument, 28 U.S.C. §1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The Court therefore should reject the appellants' attempt to characterize the end result of their own procedural maneuvering as a denial of due process by the Supreme Court of New Jersey.

Most importantly, even apart from the fact that it was appellants' trial strategy which determined the course of proceedings in the state courts, it is clear that the Supreme Court of New Jersey based its decision upon a fully adequate record. As discussed in Point II, the Supreme Court of New Jersey had before it the Basis and Background Statement of the New Jersey Department of Environmental Protection, the report of the State of New Jersey County and Municipal Government Commission entitled *Solid Waste: A Coordinated Approach* (1972), the affidavit of the Chief of the New Jersey Bureau of Solid Waste Management and of course the court's own findings in prior proceedings. These materials showed a reasonable basis for the legislative findings that the disposal of waste causes environmental and public health problems, that there is a shortage of landfill space in the state and that the disposal of waste originating out-of-state increases the overall volume of waste dumped within the state and thereby exacerbates the state's solid waste disposal problems. The New Jersey Legislature's con-

clusions as to the dangers from solid waste disposal are re-inforced by additional documentary materials of which the Court may take judicial notice and the findings of Congress. All of these sources provide a reasonable basis for sustaining the judgment of the New Jersey Legislature in banning the dumping within New Jersey of waste originating out of state. *Evco* v. *Jones, supra; Local Union No. 10* v. *Graham, supra; Welch* v. *Swasey, supra.*

The mere fact that an opinion may have been expressed by appellants that landfills can be operated without damage to public health and the environment does not give rise to a material contested issue of adjudicative fact requiring a trial. The judgment of the New Jersey Legislature is not subject to invalidation simply on the possibility that, after a contest between expert witnesses, a court may conclude that the experts attacking the legislative judgment have made the more persuasive case. As the Court stated in *South Carolina State Highway Dep't* v. *Barnwell Bros., supra,* at 191-192:

> "[C]ourts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce.
>
> • • •
>
> "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . . Being a legislative judgment it is presumed to be supported by

> facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis."

The same principles of judicial restraint were expressed in Justice Holmes' opinion in *Hebe Co.* v. *Shaw,* 248 U.S. 297, 303-304 (1918):

> "If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' *Price* v. *Illinois,* 238 U.S. 446, 452. . . . The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained, and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends."

See also *Hughes* v. *Alexandria Scrap Corp., supra,* 426 U.S. at 812-814. Similarly, since the record in the present case contains adequate support for the legislative finding that the exclusion from New Jersey of waste originating out of state reasonably would serve to protect the State's health and environment, there would be no basis for holding trial proceedings even if the appellants had not deliberately declined to avail themselves of this opportunity.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare. . . ." If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. Moreover, under the broad principles of judicial reviewability of administrative actions which exist in New Jersey (see *In re Senior Appeals Examiners,* 60 N.J. 356, 290 A. 2d 129 (1972)) if the Commissioner in exercising his power under the law were "arbitrary, unreasonable and capricious," his actions could be set aside on appeal to the courts. However, in the procedural posture in which appellants have placed this matter before the Court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9. Therefore, the record is fully adequate to sustain the constitutionality of chapter 363.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the Supreme Court of New Jersey should be affirmed.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

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TABLE OF CONTENTS OF REPLY BRIEF.

	Page
ARGUMENT	2
The Arguments Presented by Appellees Do Not Justify the Statutory Prohibition Against Entry, Treatment and Disposal of Solid and Liquid Wastes Originating Outside of New Jersey	2
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Great A. & P. Tea Co. v. Cottrell, 424 *U. S.* 366 (1976) 2

Hackensack Meadowlands v. Mun. Landfill Auth., 68 *N. J.* 451 (1975) 6, 9

H. P. Hood & Sons, Inc. v. DuMond, 336 *U. S.* 525 (1949) .. 2

Hunt v. Washington Apple Advertising Comm'n, 432 *U. S.* 333 (1978) 2, 3, 9, 10

Raymond Motor Transportation, Inc. v. Rice, — *U. S.* — (1978), 46 *L. W.* 4109 (1978) 2, 3

Statutes:

United States

42 U. S. C. § 3251 5

42 U. S. C. § 6903(26) 4

42 U. S. C. § 6944 4

42 U. S. C. § 6944(a) 3, 4, 10

42 U. S. C. § 6945 3

42 U. S. C. § 6945(c) 3

New Jersey

N. J. S. A. 13:1E-2 7

N. J. S. A. 13:1E-6a(2) 8

N. J. S. A. 13:1E-6a(3) 8

P. L. 1973, c. 363 ..... 5, 6, 9, 10, 11

P. L. 1975, c. 326 7

Administrative Regulations:

New Jersey

N. J. A. C. 7:26-2.5 10

TABLE OF CITATIONS (Continued).

Other Authorities: Page

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National Solid Wastes Management Association, New Jersey Chapter Bulletin, June, 1977 5

New Jersey Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) 9

Proceedings of the Waste Management Conference, Tri-State Regional Planning Commission, New York, 1973 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. AND DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

REPLY BRIEF OF APPELLANTS.

ARGUMENT.

The Arguments Presented by Appellees Do Not Justify the Statutory Prohibition Against Entry, Treatment and Disposal of Solid and Liquid Wastes Originating Outside of New Jersey.

Less than two weeks ago, on February 21, 1978, a unanimous Supreme Court struck down certain regulations adopted by the Wisconsin State Highway Commission "because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* — (1978), 46 *L. W.* 4109, 4114 (1978).

In arriving at its judgment, the Court made a "delicate adjustment of the conflicting state and federal claims", *H. P. Hood & Sons, Inc. v. DuMond,* 336 *U. S.* 525, 553 (1949) (Black, J., dissenting); *Great A. & P. Tea Co. v. Cottrell,* 424 *U. S.* 366, 371 (1976), by undertaking "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce". *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* —, *supra,* 46 *L. W., supra,* at 4112.

As in *Raymond Motor,* Appellants here respectfully contend that *P.L.* 1973, *c.* 363 makes no more than the most speculative contribution to public health and environmental quality, while imposing a substantial burden on interstate commerce. However, a "delicate adjustment" between state and federal claims need not be made when Congress has acted to regulate interstate commerce or when state legislation discriminates against interstate commerce, *Hunt v. Washington Apple Advertising*

Comm'n., 432 *U. S.* 333, 350 (1977), *Raymond Motor Transportation, Inc. v. Rice,* — *U. S.* —, *supra,* 46 *L. W. supra,* at 4112.

In the case at bar, Congress has not remained silent. Rather, it decisively acted "To regulate Commerce . . . among the several States . . ." by unconditionally prohibiting the disposal of solid or hazardous waste in open dumps,[1] 42 *U. S. C.* § 6945(c).

The Administrator of the United States Environmental Protection Agency is directed to establish "criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps". The criteria must, *at a minimum,* "provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility". 42 *U. S. C.* § 6944(a).

By virtue of the aforesaid Congressional action, neither solid waste nor hazardous waste can be disposed of in an open dump regardless of its place of collection or origin. The statute acts in an evenhanded manner to prevent disposal of all wastes in "unsanitary" facilities.

If the land disposal problems [2] identified by Appellees in their brief cannot be controlled to eliminate the "rea-

1. Appellees concede that each State is obligated to eliminate open dumping (Appellees Brief, p. 24, n. 2). A timetable to accomplish the Congressional directive is fixed by statute, 42 *U. S. C.* § 6945.

2. Appellees grossly distort the severity of the problems and entirely fail to address the viability of regulatory control. For example, in citing *Ground Water Contamination in the Northeast States,* U. S. Environmental Protection Agency, June 1974, Appellees convey the impression that ground water contamination is virtually inevitable. Yet, the authors of that study point out: "Each of the 11 states in the study region [including New Jersey] already appears to have legislation which, although general in nature, would allow regulations and policies to be formulated and enforced for

sonable probability of adverse effects on health or the environment", 42 *U. S. C.* § 6944(a), then existing facilities in New Jersey cannot be used to accommodate even the solid or hazardous waste collected in that State. If, on the other hand, a disposal site is a "sanitary landfill" as defined in the Resource Conservation and Recovery Act of 1976, 42 *U. S. C.* §§ 6903 (26), 6944, there is no reasonable justification for conditioning disposal upon point of origin.

Despite the inaccurate picture which they seek to convey, the most that Appellees have shown in their brief and their affidavits is that some facilities have not been designed or operated in an environmentally sound manner, and that problems may be encountered in connection with

2. (Cont'd.)
the prevention of ground-water quality degradation". *Ground Water Contamination*, at 307.

In "Leachate Effects of Improper Land Disposal", *Waste Age*, March, 1975, both the Deputy Director of the Systems Management Division of the Office of Solid Waste Management, United States Environmental Protection Agency and a soil scientist in said Agency bluntly state: ". . . *we know now that leachate does not have to be a problem in landfill operations.*

"Any land disposal practice which merits the name 'sanitary landfill' should be designed to prevent leachate pollution of surface water and ground water resources. . . . If the citizen and environmental groups who persist in opposing the location of new sanitary landfills fully understood the difference between a really properly designed and located sanitary landfill and those disposal operations which do not deserve to be called sanitary landfills, the difficulties commonly encountered in locating sanitary landfill sites would be dramatically reduced."

Appellees also cite *Gas and Leachate from Landfills: Formation, Collection and Treatment*, Proceedings of a Research Symposium held at Rutgers University, U. S. Environmental Protection Agency, March 1976. Interestingly, in "Analytical Methodologies for Leachate and Gas Analysis" contained in said volume, the authors pertinently comment: "The oldest method of solid waste disposal, that of landfilling, is still most widely used. This method can have an adverse effect on the environment unless sound engineering principles are used during design, operation and long term maintenance of the solid waste fill." at 105.

the land disposal of solid waste.[3] However, they inexplicably ignore the impact of the Rules of the Bureau of Solid Waste Management upon the problems which they identify. Said Rules, whose adoption was motivated by the "rapidly increasing generation of solid waste, the growing concern for depletion of our land resources, and increasingly sophisticated technology in solid waste management" (A149), are not even cited by Appellees in their brief.

The New Jersey Department of Environmental Protection has consistently recognized the environmental integrity of properly designed and operated land disposal facilities (Appellants' brief, pp. 8-9, 11-13, 17-18).[4] Sworn statements that such facilities adequately protect public health and environmental quality stand unrefuted in the record (A116, 181-182, 350, 353). That would not be the case if it was not true.

The New Jersey Statute, *P. L.* 1973, *c.* 363, and others like it, also create a significant adverse economic impact on interstate commerce. An estimated $3 billion was spent annually for solid waste collection and disposal in 1965 at the time of the adoption of the Solid Waste Disposal Act, 42 *U. S. C.* § 3251 *et seq.*, 1965 *U. S. Code, Cong. and Adm. News*, p. 3614. The cost of said service reached an esti-

3. Appellants do not disagree. Rather, they believe that the problems are adequately controlled by the adoption and enforcement of reasonable regulations.

4. During an interview conducted less than nine months ago, Beatrice Tylutki, Director, Solid Waste Administration, New Jersey Department of Environmental Protection, was quoted as saying: "Sanitary landfills can be operated in an environmentally acceptable manner . . . ." National Solid Wastes Management Association, New Jersey Chapter Bulletin, June, 1977. A copy of the Bulletin was filed with Mr. Justice Brennan on July 12, 1977, as part of the appendix in a Supplement to Application for Stay of Judgment, and judicial notice should be taken of same.

In a responsive affidavit appended to Appellees brief in opposition to the stay application, Ms. Tylutki commented about, but did not deny, the accuracy of the quotation attributed to her.

mated $4.5 billion by 1970, 1970 *U. S. Code, Cong. and Adm. News*, p. 4553. The House Report noted:

> "The greatest amount of the moneys spent goes for collecting solid waste and transporting it to some place where it may be dumped or burned."
>
> 1970 *U. S. Code, Cong. and Adm. News* p. 4553.

An identical conclusion was reached independently four years later by the Bureau of Solid Waste Management (A150) which noted: ". . . The collection and haulage of our solid waste accounts for 75 to 85 percent of the total collection/disposal costs . . . ."

Although the New Jersey Supreme Court erroneously held that *P. L.* 1973, *c.* 363 did not discriminate against interstate commerce in an economic sense, it recognized the obvious economic impact of its decision upon interstate commerce:

> "The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks."
>
> *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 N. J. 451, 476 (1975).

Appellant City of Philadelphia has averred that the cost of incineration facilities complying with federal and state air pollution standards would cost approximately $100,000,000 (A220). More recently, the Chief of the Bureau of Planning, Design and Resource Recovery in the Solid Waste Administration of the New Jersey Department

of Environmental Protection has estimated that if the City of Philadelphia utilized "Pennsylvania sites rather than New Jersey sanitary landfills for the disposal of its solid waste, . . . the average cost of collection and disposal would not increase by more than 10 per cent." (SA13). Since "[t]he cost for collecting and disposing of discarded materials ranks as the second largest expenditure of our nation's larger cities" [5], it is evident that prohibitory legislation can have a significant economic impact.

Despite the picture which Appellees attempt to convey, New Jersey is not overburdened or about to be consumed by waste disposal. In spite of Appellee's alleged "crisis", the State of New Jersey has never undertaken a survey to determine the amount of land available and suitable for operation of sanitary landfills (A184, 354).[6] The

5. *Materials Relating to the Resource Conservation and Recovery Act of 1976*, Committee Print No. 20 (Comm. on Interstate and Foreign Commerce), at 12.

6. In making comprehensive revisions to the Solid waste Management Act, *P. L.* 1975, *c.* 326, the New Jersey Legislature deleted its earlier "finding" that a solid waste crisis exists in the State, *N. J. S. A.* 13:1E-2. The legislature also directed the New Jersey Department of Environmental Protection to promulgate such regulations as may be necessary to protect public health and environmental quality:

> "The department shall . . . .
>
> • • •
>
> "(2) Formulate and promulgate, amend and repeal codes, rules and regulations concerning solid waste collection and solid waste disposal activities. Such codes, rules and regulations shall establish the procedures relating to the preparation and submission of environmental impact statements prior to the construction, acquisition, or operation of any solid waste facility, and shall establish standards for the construction and operation of solid waste facilities, which standards shall include, but not be limited to, provisions requiring: the maintenance of ground water quality monitoring wells to check water pollution; periodic monitoring of water quality by chemical analysis; measures to monitor methane gas production at sanitary landfills; plans for erosion control; revegetation procedures and plans for the maintenance, upkeep and reuse of

State, for its part, does not operate facilities for the disposal of municipal or industrial waste, but leaves that responsibility to industry. Sanitary landfills can only be situated on land as permitted by municipal zoning, and then only after detailed engineering plans have been reviewed and approved by the New Jersey Department of Environmental Protection.[7]

Sanitary landfilling is itself a method of recycling and resource recovery. Solid waste can be accepted for disposal at a sanitary landfill facility and used in a cost efficient and environmentally sound manner to recover severely mined or devastated lands and to produce gas for commercial purposes (A231-233).

Land recovered through sanitary landfilling is frequently devoted to public recreational use and green acres (A233, 355), "with little or no detriment to the environ-

6. (Cont'd.)

any sanitary landfill site; adequate cover material; safety measures; rodent, insect, bird, dust, fire and odor control programs; and such other measures as shall be deemed necessary to protect the public health and safety and the natural environment.

All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department, subject to its power as herein provided to amend or repeal the same."

N. J. S. A. 13:1E-6a(2)

The State Legislature has also directed, to the extent practicable, that solid waste management plans conform "to the provisions of any Federal law concerning . . . objectives, criteria and standards [for the evaluation of state solid waste management plans]." *N. J. S. A.* 13:1E-6a(3).

7. In the affidavit of Bernhardt V. Lind, Chief of the Bureau of Solid Waste Management within the Department of Environmental Protection of New Jersey (A163) he acknowledges: "The Department is required to deny registration to any facility which, in its opinion, will not meet the standards or criteria set forth in its solid waste regulations."

ment".[8] Indeed, the *New Jersey State Solid Waste Management Plan*, approved by the United States Environmental Protection Agency as the official State plan for New Jersey, frankly states:

> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area."[9]

The record demonstrates overwhelmingly that there is no reasonable basis for the findings of the New Jersey Legislature or the Supreme Court of New Jersey. Regulatory control is entirely in the hands of federal and state government, and each has admitted, explicitly or implicitly, that solid waste can be disposed of in sanitary landfills with no reasonable probability of adverse effects upon health or the environment.

Furthermore, the New Jersey Statute, *P. L.* 1973, *c.* 363, is blatantly discriminatory. After finding clearly discriminatory a North Carolina statute which was "facially neutral", this Court went on to state:

> "When discrimination against commerce of the type we found here is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."
>
> *Hunt v. Washington Apple Advertising Comm'n.*, 432 *U. S. supra*, at 353.

8. Presentation by Grant Walton, Director, Division of Environmental Quality, New Jersey Department of Environmental Protection, published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, p. 101.

9. *New Jersey Solid Waste Management Plan* (Newark: Planners Associates, Inc., 1970) p. 71. See *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 463.

The New Jersey Legislature in *P. L.* 1973, *c.* 363 made no effort to artfully disguise the discrimination; it is clearly stated. When the rule of *Hunt* is applied to New Jersey, the State has not met its burden to justify the discrimination either in terms of legitimate local benefits or unavailability of nondiscriminatory alternatives. Indeed, a justification has not even been attempted!

The only local benefit asserted by Appellees is that the discrimination imposed by the ban ". . . prolongs the useful life span of landfills within the state . . ." (A54). Upon analysis this is purely an economic benefit. Appellees have never contended that New Jersey regulations governing the operation of sanitary landfills are inadequate to protect the public health, or fail to meet the criteria for sanitary landfills demanded by the Resource Conservation and Recovery Act:

> "no reasonable probability of adverse effects on *health* or the *environment*."
>
> 42 *U. S. C.* § 6944(a) (emphasis added)

Rather, Appellees have diverted attention from the control effected by existing regulations for sanitary landfills, *N. J. A. C.* 7:26-2.5 *et seq.*, to the problems which these regulations are designed to correct.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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Supreme Court, U. S.
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Appellees.

On Appeal From the Supreme Court of the State of New Jersey

BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS
BRIEF AMICUS CURIAE

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
INTEREST OF AMICUS CURIAE	2
ARGUMENT	
I. Solid and Liquid Wastes and the Services Related to their Disposal are in Interstate Commerce	4
II. A State Statute Which Prohibits the Entry into the State of Solid and Liquid Wastes Collected Outside the State Discriminates Against and Places an Undue Burden on Interstate Commerce	6
III. A State Statute Which Prohibits the Entry into the State of Solid or Liquid Wastes Collected Outside the State is Inconsistent with the Federal Scheme For Such Wastes	8
CONCLUSION	10

TABLE OF CITATIONS

Cases:

Asbell v. Kansas, 209 U.S. 251 (1908)	4
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	9
Bowman v. Chicago &c. Railway Co. 125 U.S. 465 (1888)	4
Clason v. Indiana, 306 U.S. 439 (1939)	4

Page

Cases, continued:

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) 9

Crossman v. Lurman, 192 U.S. 189 (1904) 4

Great Atlantic and Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 6, 7

Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, 127 N.J. Super. 160, 316 A. 2d 711 (Ch. 1974), rev'd 68 N.J. 451, 348 A. 2d 505 (1975) 4

Hines v. Davidowitz, 312 U.S. 52 (1941) 9

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 6

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 6

Sligh v. Kirkwood, 237 U.S. 52 (1915) 4

Constitution and Statutes:

Federal Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 seq. (1976) 8, 9

Maine Solid Waste Disposal Act, as amended, Maine Rev. Stat. Ann, Title 17, Sec. 2253 10

Pennsylvania Solid Waste Management Act, as amended, 1974 P.A. 337 10

United States Constitution, Article 1, Sec. 8, cl. 3 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Are solid and liquid wastes and the services related to their disposal in interstate commerce?

2. Does a state statute which prohibits the entry into the state of solid or liquid wastes collected outside the state (except for garbage to be fed to swine) discriminate against or place an undue burden on interstate commerce?

3. Is a state statute which prohibits the entry into the state of solid or liquid wastes collected outside the state (except for garbage to be fed to swine) inconsistent with the Federal scheme for such wastes as expressed in the Federal Solid Waste Disposal Act, as amended?

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of the Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The American Public Health Association (hereinafter "APHA") has received consent from the parties to file this brief as amicus curiae; the consent letters are on file with the clerk.

APHA is a non-profit corporation organized under the laws of Massachusetts. Its national membership consists of approximately 29,000 public health professionals. APHA's objective is the protection and promotion of public health by means which include environmental controls. It has a strong interest in promoting rational planning at the local, state, regional, and national levels of government through strong regulations and land use planning legislation which accomplish the effective and efficient disposal and recycling of solid wastes in a manner which adequately protects public health and the environment.

APHA is concerned that regulation of the environment in the name of public health be efficient and effective. The public health impact of solid and liquid wastes can adequately be minimized by the licensing of landfill sites and operators and a system of requirements and inspections directed at the nuisance and disease potential of such sites. However, while recognizing the appropriateness of a state's concern with land preservation as an independent public policy objective, APHA believes that a flat prohibition against the importation of solid wastes suffers from overbreadth as a policy instrument. Public health protection and land preservation objectives both can be served by less burdensome systems of regulation more precisely, efficiently, and effectively tailored to the objectives.

APHA also believes that the unwanted public health and land use impacts occasioned by the land disposal of solid wastes (as with other "pollutants") do not respect political boundaries, particularly in and around densely populated urbanized areas. Therefore, rational planning and regulation demand cooperation among governments rather than conflict based on artificial boundaries. The Congress apparently shares this view, for the Solid Waste Disposal Act, as amended, provides a Federal commitment to inducing cooperation among governments as a means to achieve public health protection and land preservation, as well as recycling, in connection with solid and liquid wastes. APHA believes this federal scheme must not be undercut by states' efforts to erect burdensome and discriminating artificial barriers against cooperation.

APHA therefore believes that the related goals of public health protection and land preservation can best be served by fostering the development of mutually accommodating policies about solid and liquid waste disposal among governments, and herewith submits its views on the legal issues to this Court for its assistance.

ARGUMENT

I

SOLID AND LIQUID WASTES AND THE SERVICES RELATED TO THEIR DISPOSAL ARE IN INTERSTATE COMMERCE

This issue is raised by appellee's argument below and to this Court that the collection, treatment, transportation, and disposal of solid and liquid wastes are not in interstate commerce and thus do not fall within the ambit of the commerce clause of the Constitution, Article I, Section 8. The argument appears to be that such wastes are not commercially valuable and are allegedly injurious to public health.

It is at best inaccurate to rely upon a distinction between valuable and valueless solid and liquid wastes, as suggested by appellees and the New Jersey Supreme Court below, 68 N.J. at 468. This Court has recognized the authority of a state to prohibit introduction into its territory of inherently disease-producing articles and substances, but at the same time held that this authority does not extend to merchantable articles. *Bowman v. Chicago &c. Railway Co.*, 125 U.S. 465, 488-489 (1888). Thus the intrinsic nature of articles is an inappropriate basis for a state's prohibition against those articles; it is proper to distinguish the decisions of this Court holding that "non-merchantable" items are not "commerce" (e.g., *Clason v. Indiana*, 306 U.S. 439 (1939) [animal carcasses]; *Asbell v. Kansas*, 209 U.S. 251 (1908) [unhealthy swine or cattle]; *Crossman v. Lurman*, 192 U.S. 189 (1904) [noxious or decayed foods]; *Sligh v. Kirkwood*, 237 U.S. 52 (1915) [immature citrus fruit]) as aimed at protecting the public from mistaking those food and drug items as fit foods and to prevent the spread of disease. See the New Jersey trial court's decision in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N.J. Super. 160, 169-70, 316 A.2d 711 (CH. 1974).

Therefore, the recognition that solid and liquid wastes may be of mixed merchantable character is sufficient to bring them within the protection of the interstate commerce clause; such a recognition does not deny a state sufficient authority to protect public health. However, it seems clear from the New Jersey Supreme Court's opinion that the purpose of the statute at issue was not to protect public health but to preserve landfill capacity. 68 N.J. at 465 n.10. It is insufficient for a state to allege public health protection when the officially-recognized purpose does not include it. It can only be, then, that nonmerchantability is the only argument which supports the New Jersey statute on this issue. This argument amounts to a conclusion that less intrusive measures are available to a state to perform its police power functions without trying to exclude an article as being "valueless." This conclusion preserves the state's essential and important authority to take appropriate prohibitory action where such action is most effective and efficient.

This Court should therefore hold that appellee's argument below and to this Court, and the decision of the New Jersey Supreme Court below, are in error in concluding that the absence of commercial value of an article is sufficient to remove that article from the protection of the interstate commerce clause, and that the assertion of public health protection purpose, without more, does not justify a conclusion of nonmerchantability.

II

A STATE STATUTE WHICH PROHIBITS THE ENTRY INTO THE STATE OF SOLID AND LIQUID WASTES COLLECTED OUTSIDE THE STATE DISCRIMINATES AGAINST AND PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE

The state interest arguably sought to be advanced by New Jersey, the protection of public health and welfare, is clearly legitimate. However, the question is whether the burden imposed on the interstate commerce of solid waste collection, transportation, treatment, and disposal is excessive. This Court recently reiterated the proper test to be applied to state statutes affecting interstate commerce:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Huron Cement Co. v. Detroit,* 362 U.S. 400, 443, 80 S. Ct. 813, 816, 4 L.Ed. 2d 852. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed. 2d 174 (1970) [footnote omited].

Great Atlantic & Pacific Tea co. v. Cottrell, 424 U.S. 366, 371, 96 S. Ct. 923, 928, 47 L. Ed. 2d 55, 61 (1976).

The New Jersey statute at issue here clearly discriminates against solid and liquid wastes based solely on their origin or collection outside New Jersey. However, the most cogent issue is whether this discrimination imposes an undue burden on interstate commerce despite New Jersey's legitimate interests in

protecting public health and preserving land. The New Jersey Supreme Court asserted below that *Huron Cement Co. v. Detroit, supra*, stood for the proposition that "the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of [the state's police] power." 68 N.J. at 473. However, the ordinance in *Huron* did not involve discrimination as it was applicable to "any person, firm, or corporation" operating within Detroit, and this Court clearly pointed out that the discrimination argument was not even made. 362 U.S. at 448. Here, New Jersey's action against wastes originating outside the state did not impose equally stringent burdens on wastes originating inside the state; apparently, public health can be protected and land preservation can be accomplished by sufficiently effective means if only New Jersey trash is involved.

Though public health and land preservation are legitimate state objectives, the discrimination against out-of-state wastes New Jersey seeks to impose require that the state justify the heavy burden, according to the test laid down in *Great Atlantic & Pacific Tea, supra*. Clearly the burden on interstate commerce involved here is not merely incidental, and there it must be determined whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...", *Huron Portland Cement Co., supra* at 443, and whether the state's interest "could be promoted as well with a lesser impact on interstate activities...", *Pike v. Bruce Church, supra* at 142. The New Jersey Supreme Court clearly recognized the "true reason" for enactment of the statute in question here was not public health protection, but preventing the acceleration of depletion of existing landfills. 68 N.J. at 465 n.10. With respect to the land preservation purpose, the New Jersey Supreme Court referred to several landfill capacity studies made in various areas of the state (which are difficult to reconcile) but apparently accepted (without providing documentation) that "a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8% ...." 68 N.J. at 461. Even recognizing local variation, it is clear

that the prohibition against out-of-state wastes will not extend landfill life beyond a very modest amount.

Therefore the issue is whether, given the insubstantial contribution to land preservation provided by the prohibition, the state of New Jersey considered and evaluated adequate alternatives. The record in this case is bare of consideration of such alternatives such as requiring more compacting methods of disposal and the utilization of landfill sites outside the state of New Jersey. The failure to evaluate these alternatives and to compare their benefits to the putative benefits of a prohibition against out-of-state wastes is a defect of constitutional magnitude, particularly where Congress itself has declared it a national policy to foster the use of such alternatives. The Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 et seq. (1976).

Thus this Court should conclude that New Jersey P.L. 1973, c. 363, N.J.S.A. 13: 1I-10, is unconstitutional as discriminatory against and an undue burden on interstate commerce.

III

A STATE STATUTE WHICH PROHIBITS THE ENTRY INTO THE STATE OF SOLID OR LIQUID WASTES COLLECTED OUTSIDE THE STATE IS INCONSISTENT WITH THE FEDERAL SCHEME FOR SUCH WASTES

Congress, in Solid Waste Disposal Act, 42 U.S.C. 3251 et seq., as amended by the Resource Conservation and Recovery Act of 1976, 90 STAT. 2795 (1976), now codified at 42 U.S.C. 6901 et seq., found that

> ...while the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies, the problems of waste disposal...have become a matter national in scope and in concern and necessitate Federal action....

42 U.S.C. 6901(a)(4). The New Jersey Supreme Court, on remand from this court to consider the question of whether the then-newly-enacted Resource Conservation and Recovery Act, *supra,* pre-empts the New Jersey statute at issue, correctly concluded that no pre-emption occurred. 75 N.J. 562, 376 A. 2d 888 (1977).

However, this Court has recognized that a state policy may be sufficiently inconsistent with a federal policy or objective so as to be invalid, *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 581 (1942), or to present a sufficient obstacle to the achievement of a federal objective as to be invalid. *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941). While it is clear that the Solid Waste Disposal Act, as amended, *supra,* does not occupy the field, the various programs for solid waste disposal regions and plans, while involving only federal guidelines and technical and financial assistance, clearly evince a desire by Congress to foster cooperation among governments. 42 U.S.C. 6941. Interstate cooperation is also a goal of the statute, including the formation of interstate compacts. 42 U.S.C. 6904. Finally, federal support is provided for "the development, demonstration, and application of new and improved methods and processes to reduce the volume of waste and unsalvageable materials and to provide for proper and economical solid-waste disposal practices." 42 U.S.C. 6901(a)(4). See also 42 U.S.C. 5001-5004 (resource recovery technology) and 8001-8006 (research, development, and demonstration).

Avoiding "rivalries and reprisals" appears to be the purpose of both the commerce clause, *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. at 522 (1935) and the Solid Waste Disposal Act, as amended, *supra*. To uphold the New Jersey prohibition here at issue would invite retaliatory action which would seriously impair the federal objectives stated above. Indeed, the Commonwealth of Pennsylvania has enacted legislation to prevent disposal in Pennsylvania of solid waste collected in another state that does not accept solid waste from

Pennsylvania. 35 P.S. 6007 et seq. The state of Maine has enacted a prohibition against out-of-state waste similar to New Jersey's. Maine Rev. Stat. Ann. Title 17, Sec. 2253. This type of prohibition, which is apparently increasing, clearly frustrates the attainment of both the commerce clause and federal policy, which is a sufficient inconsistency to justify invalidating the New Jersey statute.

CONCLUSION

New Jersey P.L. 1973, 1973, ch. 363 was enacted solely to impede the flow of commerce in solid and liquid wastes. These wastes have sufficient valuable content so as to be merchantable, and the state does not do more than allege a public health protection purpose. The prohibition unduly burdens interstate commerce, and the state has not demonstrated adequate consideration of available, adequate, and less burdensome alternatives. In addition, the use of such an approach will frustrate the achievement of federal policy by making cooperative efforts to deal with the very real public health and land preservation problems impossible. The prohibition cannot be validated under the Constitution.

Respectfully submitted,

Jeffrey B. Schwartz
Attorney for Amicus Curiae

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS
BRIEF AMICUS CURIAE

Page

QUESTIONS PRESENTED 1

STATEMENT OF CASE 2

INTEREST OF AMICUS CURIAE 2

ARGUMENT

I. Solid and Liquid Waste and the Services Related to Disposal of Such Wastes are Legitimate Subjects of Interstate Commerce 5

II. P.L. 1973, c. 363, Discriminates Against Interstate Commerce in Violation of Article 1, Section 8, of the United States Constitution 13

III. Consideration of the Resource Conservation and Recovery Act of 1976, While Relevant to the Instant Case, Should Not Obscure the Important Constitutional Issue Presented by This Case 35

CONCLUSION 37

CERTIFICATE OF SERVICE 39

TABLE OF CITATIONS

Cases:

Alexandria Scrap Corp. v. Hughes, 391 F.Supp. 46 (D. Md. 1975), rev'd, 96 S.Ct. 2488 (1976) 7, 8, 10, 16, 22

American Can Co. v. Oregon Liquor Control Commission, 15 Ore. App. 618, 517 P.2d 691 (1973) 17

Asbell v. Kansas, 209 U.S. 251 (1939) 9

Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) 17, 33

Best & Co., Inc. v. Maxwell, 311 U.S. 454 (1940) 33

Canton Poultry, Inc. v. Conner, 278 F.Supp. 822 (N.D. Fla. 1968) 15

Clason v. Indiana, 306 U.S. 439 (1939) 9

Cases, continued:

	Page
Construction Industry Association v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S.Ct. 1148 (1976)	16, 17
Crossman v. Lurman, 192 U.S. 189 (1904)	9
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	28
Douglas v. Seacoast Products, Inc., 97 S.Ct. 1740 (1977)	10, 26
Great Atlantic & Pacific Tea Co. v. Cottrell, 96 S.Ct. 923 (1976)	13, 17, 26, 27, 33
Hackensack Meadowlands v. Municipal Landfill Authority, 127 N.J. Super. 160, 316 A.2d 711 (Ch. 1974), rev'd, 68 N.J. 451, 348 A.2d 505 (1975)	9, 24
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963)	15
Hunt v. Washington State Apple Advertising Commission, 97 S.Ct. 2434 (1977)	27
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	13, 14, 15, 17
J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc., 1977-2 Trade Cases ¶61,727 (3d Cir. 1977)	10
National League of Cities v. Usery, 96 S.Ct. 2465 (1976)	23
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	17, 18, 19, 21, 23, 32, 33
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	13, 27, 34
Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964)	17
Portland Pipe Line Corp. v. Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U.S. 1035 (1973)	17
Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975)	17
Sligh v. Kirkwood, 237 U.S. 52 (1915)	9

Cases, continued:

	Page
Toomer v. Witsell, 334 U.S. 285 (1948)	34
United States v. Bishop Processing Co., 287 F.Supp. 624 (D. Md. 1968), aff'd, 423 F.2d 469 (4th Cir. 1970), cert. denied, 398 U.S. 904	11
United States v. Pennsylvania Refuse Removal Association, 242 F.Supp. 794 (E.D. Pa. 1965), aff'd, 357 F.2d 806 (3d Cir. 1966), cert. denied, 384 U.S. 961	8, 10, 12
West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)	17, 18, 20, 23, 31

Constitution and Statutes:

Federal Safe Drinking Water Act, 42 U.S.C.A. §300f *et seq.* (Supp. 1975)	25
Federal Water Pollution Control Act, 33 U.S.C.A. §1151 (Supp. 1975)	25
Pennsylvania Solid Waste Management Act, P.L. 788, as amended, 1974 P.A. 337	32
Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq.* (Supp. 1975), amending Federal Solid Waste Disposal Act of 1965, 42 U.S.C. §3251 *et seq.* (1970)	31, 35, 36, 37
United States Constitution, Article 1, Sec. 8, cl. 3	2, 5
United States Constitution, Article VI	2, 35

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Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Are solid and liquid waste and the services related to disposal of such wastes subjects of interstate commerce for purposes of the protection of the United

States Constitution, Article I, Section 8, against state attempts to regulate interstate commerce?

2. Does a state statute that prohibits the entry into the state of solid or liquid waste (except garbage to be fed to swine in the state) collected outside the state, discriminate against or place an undue burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution?

3. To what extent does the Resource Conservation and Recovery Act of 1976 relate, under the United States Constitution, Article VI, to a state statute that prohibits the entry into the state of solid and liquid waste collected outside the state?

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The National Solid Wastes Management Association is a trade association based in Washington, D.C. which represents all major segments of private industry engaged in the solid waste field. This membership comprises over 2,000 contractor members, companies which are directly engaged in the collection, processing, transportation and disposal of residential and commercial waste material. Such members range from large, New York Stock Exchange–listed firms having operations throughout the United States to small family-operated one- or two-truck operators engaged in limited local markets. Aggregately, private industry engaged in solid waste collection and disposal is responsible for approximately half of the residential solid waste and

over 90 percent of the commercial and industrial liquid and solid waste collected and disposed of in the United States. *The Private Sector in Solid Waste Management, A Profile of Its Resources and Contribution to Collection and Disposal*, U.S. Environmental Protection Agency, SW-51d.1 (1973), p. 1.9. The Association's membership also includes owners and operators of landfill disposal facilities, manufacturers of virtually all types of equipment involved in the solid waste field and companies engaged in recovery of materials and energy from the solid waste stream. The Association is the recognized spokesman for the private solid waste industry before the federal government and state legislative and executive bodies and has participated extensively at all levels of government in the formulation of laws and policies dealing with improved environmental and economic standards for the collection, processing, disposal, and recovery of solid wastes.

The issues presented in the instant case have broad implication for the business of the Association's membership and the quality and cost of the services they are able to provide to the public. Proper disposal of solid waste has become a serious and increasingly expensive undertaking, in some situations a crisis, throughout the country. In addition to the greater awareness of the potential hazards to public health and safety posed by irresponsible methods of disposal, more stringent air emission standards have caused a closing down of incinerators throughout the country, thus creating even greater reliance upon land disposal. Increased attention to water pollution at federal and state levels has drawn attention to the effects of land disposal on underground water, a concern that has been intensified by the diversion of increasing volumes of

liquid waste to land disposal facilities in areas where dumping into streams and rivers had previously been permissible.

In facing these environmental needs, states have pursued a broad range of solutions. Major focus has been given to long-term regional planning for waste disposal and land use. In many areas massive resource recovery programs have been initiated. These have been the directions urged and to some extent financed by the federal government through the Solid Waste Act of 1965, 42 U.S.C. §3251 et seq., the Resource Recovery Act of 1970, 42 U.S.C. §3254 et seq., and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 et seq., legislation premised upon the concept of cooperation among state and local governments to deal with a widespread problem that knows no state or local boundaries.

In a few instances, however, in desperation at the quantity of waste material to be absorbed and the difficulty in obtaining suitable land disposal sites due to increased public resistance and local zoning restrictions, resort has been made to laws or ordinances, such as that of the State of New Jersey in the instant case, to prohibit importation of waste material across state or other jurisdictional lines. Such action imposes immediate and direct restraints upon, and threatens economic injury to, private firms operating or using land disposal sites. Moreover, it is a form of action that cannot be isolated. Jurisdictions deprived of access to traditional disposal sites beyond their boundaries will respond with similar barriers. Eight states have already instituted such import restrictions in one form or another,[1] and it is

[1] Jurisdictional Statement 30-31.

our understanding that many other states and local jurisdictions are considering similar measures but are withholding action pending the outcome of this case. If the New Jersey Supreme Court's decision is allowed to stand, amicus believes that non-importation legislation will proliferate, and that this regressive and discriminatory approach, rather than the positive regional approach sanctioned by Congress and now pursued by many states, will substantially dictate the future direction of solid waste management policies throughout the United States. The New Jersey statute presents a major impediment to sound forward-looking regional policies. This impediment will be eliminated by a decision of this Court that such a provision is in conflict with the commerce clause of the United States Constitution.

ARGUMENT

I.

SOLID AND LIQUID WASTE AND THE SERVICES RELATED TO THE DISPOSAL OF SUCH WASTES ARE LEGITIMATE SUBJECTS OF INTERSTATE COMMERCE.

Appellees have argued below that the collection, treatment and disposal of solid and liquid wastes do not fall within the scope of the commerce clause of the Constitution, Article 1, Section 8. The basis for appellees' argument in this regard appears to be that waste products are not legitimate subjects of interstate commerce because they are nonmerchantable and allegedly injurious to the public health.

It cannot be plausibly asserted that waste materials are without actual or potential value. It is universally recognized that waste products are an increasingly important source of resource recovery and energy genera-

tion,[2] and that the disposition of waste materials is a significant aspect of land reclamation programs.[3] Moreover, the increased attention directed at enhancing the range of valuable end uses of waste materials, coupled with the development of increasingly sophisticated technologies, indicate that the spectrum of possible uses of waste materials will continue to be substantially broadened in the future.

Apart from the importance of waste materials for the purposes discussed above, the distinction suggested by the appellees and the New Jersey Supreme Court below, 68 N.J. at 468, between valuable and "valueless" waste materials fails to recognize that the value or merchantability of waste materials often depends to a significant extent, and perhaps more so than in any other industry, on the marketplace rather than on any intrinsic qualities of the "waste" materials in question. In recent years the demand for many "waste" materials, and thus a chief determinant of the value of such materials, has fluctuated considerably, depending on external economic factors including the supply and demand behavior of other industries. Thus, any attempt to categorize waste materials as intrinsically "valueless" or nonmerchantable misperceives an essential economic characteristic of the waste management industry. Therefore, to adopt such a distinction for purposes of commerce

[2] *See, e.g., Solid Waste Management Forecasts—A Projection of Trends Likely to Occur: Storage, Collection, Processing, Recovery, and Disposal*, National Solid Wastes Management Association Technical Bulletin (March/April 1976); *Resource Recovery From Solid Wastes—A Progress Report*, National Solid Wastes Management Association Technical Bulletin (June 1976).

[3] *See, e.g., Sanitary Landfills: Potential Land Uses for the Future*, National Solid Wastes Management Association Technical Bulletin (January 1976).

clause analysis in cases involving the waste management industry would be to adopt an artificial, inaccurate and obviously unmanageable criterion.

In a context closely analogous to the present case, the federal district court for the district of Maryland has held that the movement of automobile hulks across state lines constitutes interstate commerce. *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 59 (D. Md. 1975), *rev'd on other grounds*, 96 S. Ct. 2488 (1976). (It is particularly significant that automobile hulks are expressly included within the definition of "bulky waste" in the rules of New Jersey's Bureau of Solid Waste Management. N.J.A.C. 7:26-1.4.3.) In that case the district court faced the issue whether a Maryland statutory scheme designed to rid the state of abandoned vehicles through the use of bounties and assessments violated the commerce clause of the federal constitution.

In making the initial determination that the movement of automobile hulks across state lines constituted interstate commerce, the court in *Alexandria Scrap* found that "the movement of vehicles across state lines involving plaintiff is substantial." *Id.* at 59 n.28. Judged by the substantiality of interstate business in the items involved, it can hardly be doubted that the movement of waste products across state lines, which constitutes a substantial portion of the refuse removal industry's business activity, clearly constitutes interstate commerce. And, while the Supreme Court in *Alexandria Scrap* reversed the district court and thereby upheld the constitutionality of the Maryland statutory scheme, the Court did not dispute the lower court's finding that the transportation of automobile hulks was a valid subject of interstate commerce.

Even aside from the acknowledged merchantable qualities of waste in the present day that obviously bring it within the constitutional sense of commerce, the contention that the movement of wastes does not fall within the ambit of the commerce clause also ignores the crucial point that the service of collecting, transporting and disposing of such waste materials constitutes interstate commerce.[4] This principle was clearly established in *United States v. Pennsylvania Refuse Removal Association*, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3d Cir. 1966), *cert. denied*, 384 U.S. 961, wherein the district court stated:

> Here, the real subject of "trade or commerce" was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the word "trade or commerce" as used in the [Sherman] Act, United States v. National Association of Real Estate Boards, 339 U.S. 485, 488-492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950), the defendants' position has no merit.

242 F. Supp. at 799. This holding was expressly affirmed by the court of appeals for the Third Circuit, which declared, "... refuse transported from Pennsylvania to New Jersey and disposed of in the latter state ... was plainly a proper subject of interstate commerce." 357 F.2d at 808.

The decisions of the district and circuit courts in *Pennsylvania Refuse Removal, supra*, recognized a fundamental fact that appellees have previously at-

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[4] *Cf. Hughes v. Alexandria Scrap Corp.*, 96 S. Ct. at 2502 (Brennan, J., dissenting): "[T]he Court does not and could not find that the market for scrap metal—including its processing—is not interstate commerce."

tempted to obscure by characterizing the instant case as indistinguishable from those Supreme Court decisions holding that nonmerchantable items are not within the protection of the commerce clause, *see, e.g., Clason v. Indiana*, 306 U.S. 439 (1939) (animal carcasses); *Asbell v. Kansas*, 209 U.S. 251 (1908) (unhealthy swine or cattle); *Crossman v. Lurman*, 192 U.S. 189 (1904) (noxious or decayed foods); *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (immature citrus fruit). As the trial court in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N.J. Super. 160, 169-170, 316 S.2d 711 (Ch. 1974), correctly recognized, this line of cases

> classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as non-merchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease.

However, in considering whether the service of collecting, transporting and disposing of waste materials constitutes interstate commerce, the contention that some waste materials may not in and of themselves be "merchantable" – an argument that at best is seriously misleading and inaccurate for reasons discussed previously – only begs the question at issue, since the business of removal and disposition of such materials as may be nonmerchantable is a direct function of their nonmerchantability. Because the refuse removal industry deals partly in presently nonmerchantable materials, appellees would exclude this industry, or at least a substantial part thereof, from the scope of commerce clause protection, despite the fact that the very function of this industry and the reason for its

existence and its strictly regulated character is to provide the public with the essential *service* of removing and disposing of nonmerchantable materials which *otherwise* could pose health problems. The obvious fallacy of appellees' position was recognized by the district court in *Pennsylvania Refuse Removal, supra*, when the court declared that focusing on the nonmerchantability of some waste materials "misse[d] the point" since the essential subject of trade or commerce was the vital service of removing and disposing of such materials. 242 F. Supp. at 799.

In asserting that the commercial movement of waste materials across state lines does not constitute interstate commerce,[5] appellees have previously contended that *Pennsylvania Refuse Removal* is inapposite since that case dealt with interstate commerce in the context of the enforcement of a federal statute (the Sherman Act) rather than in the context of commerce clause limitations on a state's police power (i.e., the so-called "positive" versus "negative" implications of the commerce clause, *see* 68 N.J. at 469; *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740, 1754 n.25 (1977) (Rehnquist, J., concurring in part and dissenting in part.) Three points warrant mention in response to this contention.

First, the case of *Alexandria Scrap Corp. v. Hughes*, discussed *supra*, which held that the movement of automobile hulks across state lines was interstate

[5]Questions such as whether the activity involved is a "local" rather than interstate activity, or whether the products involved have come to rest in the state—questions which may be relevant in cases involving state regulation or taxation of goods assertedly in interstate commerce, *see, e.g., J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 1977-2 Trade Cases ¶61,727 (3d Cir. 1977)—are not involved in the present case.

commerce, did not deal with the enforcement of a federal statute, but rather dealt with precisely the same issue as is presented by the instant case – the scope of the commerce clause of the federal constitution as a limitation on a state's police power.

Second, while this Court, in cases involving the imposition of incidental burdens on interstate commerce, has often acknowledged a state's power to effectuate legitimate local interests, this recognition does not properly go to the *jurisdictional* question of whether interstate commerce is involved, but rather concerns the issue on the merits of accommodating federal and state interests. Thus, the appellees' attempt to dismiss the threshold "in commerce" determination of the court in *Pennsylvania Refuse Removal, supra*, involves considerations not properly at issue in ascertaining whether a particular activity constitutes interstate commerce within the meaning of the commerce clause.

Third, even assuming for purposes of argument that in certain instances an interstate activity properly subject to federal regulation under the commerce clause would not be within the ambit of the commerce clause for purposes of a challenge to state regulation, such a distinction is clearly inappropriate when applied to the interstate solid waste industry. It is perhaps conceivable, for example, that air pollutants drifting across state lines, while clearly subject to federal regulation, *see, e.g., United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904, would not be classified as within the commerce clause if a state attempted to regulate the flow of such material into its territory.

Ambient air pollution, of course, is not the subject of a legitimate and substantial interstate commercial activity. The transportation of solid wastes, and the services related thereto, however, are of an entirely different character since these activities have long been recognized as legitimate *commercial* activities. Thus, as the court in *Pennsylvania Refuse Removal, supra*, recognized, it is not so much the intrinsic quality of the subject matter as rather the nature and substance of the commercial activity involved that should determine whether such activity is embraced by the commerce clause. Where, as here, a legitimate, substantial, and indeed socially vital *commercial* activity is involved, it cannot reasonably be held that such an established activity in interstate commerce is not entitled to the protection of the commerce clause. This was recognized by the courts in *Pennsylvania Refuse Removal, supra*, and the fact that such recognition was made in a case involving a federal statute does not diminish the analytical soundness of the courts' determination of whether an activity should realistically be viewed as a proper subject of interstate commerce.

In sum, then, appellees' arguments below, and the analysis of the New Jersey Supreme Court, fail to recognize existing precedent holding that the commercial movement of waste materials across state lines falls within the scope of the commerce clause, and ignore the substantial and essential interstate commercial character of the refuse removal industry.

II.

PUBLIC LAW 1973, CHAPTER 363, DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF ARTICLE 1, SECTION 8, OF THE UNITED STATES CONSTITUTION.

In *Great Atlantic & Pacific Tea Co. v. Cottrell*, 96 S.Ct. 923, 928 (1976), this Court reiterated the prevailing test for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (footnote omitted).

It is clear that, under the standard articulated in *Huron Cement Co. v. Detroit, supra*, and reaffirmed in *Pike v. Bruce Church, Inc., supra*, and *Great Atlantic & Pacific Tea Co. v. Cottrell, supra*, the statute in the instant case is not an evenhanded regulation, but rather prohibits the disposal of waste material solely on the basis of the origin of such material. In this manner the statute, in purpose and effect, discriminates only against wastes collected outside New Jersey. Such a statute is distinguishable, therefore, from statutes or regulations involved in cases in which a state or locality attempted to regulate nondiscriminatorily particular activities

which had some effect on interstate commerce. *See, e.g., Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Huron Cement Co. v. Detroit, supra.*

A particularly pertinent example of such a nondiscriminatory regulation case is *Huron Cement Co. v. Detroit, supra*, which was relied upon by the New Jersey Supreme Court below in asserting that "the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this [the state's police] power." 68 N.J. at 473. In *Huron*, the regulation in question restricted the amount and density of pollution emitted by vessels docked in the city of Detroit. In upholding the ordinance against the challenge of discrimination against interstate commerce, the Court declared:

> State regulation, based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. State of Georgia, 163 U.S. 299, 16 S.Ct. 1086, 41 L.Ed. 166; Lake Shore & Michigan Southern Railway Co. v. State of Ohio, 173 U.S. 285, 19 S.Ct. 465, 43 L.Ed. 702; Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Bob-Lo Excursion Co. v. People of State of Michigan, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.
>
> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designated to better the health and welfare of the community.... We conclude that no impermissible burden on commerce has been shown.

362 U.S. at 448 (emphasis added). Thus, the ordinance in *Huron* did not involve any discrimination against interstate commerce and therefore presented an entirely different situation than does the New Jersey statute, which, while purportedly aimed at environmental problems, discriminates solely against interstate commerce while neglecting entirely any environmental considerations arising from the collection and disposition of wastes within New Jersey.

The principle enunciated in *Huron* that a state regulation based on the police power must be nondiscriminatory has been followed by this Court and by the lower federal courts in numerous instances. In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Court upheld a New Mexico statute which prohibited certain forms of advertising. Although the Court found that the trial court's injunction against the appellants "unquestionably imposed some restraint upon that [interstate] commerce," *id.* at 427-28, the Court upheld the statute as a measure directly addressed to protection of the public health. In reaching its conclusion the Court, citing *Huron*, noted that, "It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such." 374 U.S. at 429. Similarly, in *Canton Poultry, Inc. v. Conner*, 278 F. Supp. 822 (N.D. Fla. 1968), the court upheld a Florida poultry law providing for inspection, grading and tagging of poultry products sold within the state. In so holding, the court stated:

> State legislation, based on police power, which does not discriminate against interstate commerce

> is not in conflict with the Commerce Clause. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852. The state act is applied to locally produced poultry offered for sale in Florida as well as poultry shipped into the State. Any burden which might result from compliance with the state law rests equally upon the local distributors, and is therefore nondiscriminatory.

278 F. Supp. at 825. See also *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976) ("since the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the [regulation] unreasonably burdens commerce must fail." (footnote omitted).

And, in *Hughes v. Alexandria Scrap Corp.*, discussed *supra*, one of this Court's most recent encounters with a commerce clause challenge to a state regulation, the Court made clear that a Maryland statutory scheme designed to rid the state of automobile hulks did not by its terms prohibit interstate commerce. In comparing the case before it to cases involving discriminatory or burdensome regulations of interstate commerce, the Court observed:

> The common thread of all these [prior] cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, nor to regulate the conditions under which it may occur.

96 S. Ct. at 2496.

The New Jersey Supreme Court, in citing judicial decisions supporting a state's power to enact health and environmental legislation, cited cases within the category of nondiscriminatory regulation. 68 N.J. at 476, *citing Huron Cement Co. v. City of Detroit, supra; Construction Industry Association v. City of Petaluma, supra; Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Commission*, 15 Ore. App. 618, 517 P.2d 691 (1973); *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Me. 1973), *appeal dismissed*. 414 U.S. 1035 (1973). In all of the above-cited cases, therefore, including *Huron*, there is no question raised as to discrimination exclusively against interstate commerce. The instant case, however, puts in issue precisely such a discriminatory regulation aimed solely at the interstate transportation and disposition of waste materials. Thus, the instant case directly parallels those cases wherein a state, for whatever ostensible reason, attempts to curtail the flow of commerce across state lines. See, e.g., *Great Atlantic & Pacific Tea Co. v. Cottrell, supra; Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

In an attempt to justify the wholly discriminatory nature of P.L. 1973, c. 363, the appellees and the New Jersey Supreme Court have attempted to categorize as impermissible only such discriminatory statutes as manifest a blatant attempt by the enacting state to erect barriers to competition for the economic and

commercial advantages of the regulating state. Illustrative of this attempt at facile categorization is the cursory treatment by the New Jersey Supreme Court of the "natural gas" cases, *West v. Kansas Natural Gas Co., supra*, and *Pennsylvania v. West Virginia, supra*. In rejecting the rationale of the state's trial courts, the New Jersey Supreme Court declared:

> In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic.

68 N.J. at 447. The appellees' and the New Jersey Supreme Court's characterization of the aforementioned two cases clearly does not, however, fully address the facts and the Supreme Court's reasoning in these cases, particularly as articulated in *Pennsylvania v. West Virginia, supra*. In that case the Court recognized the appellant's contention that the statute was a vehicle to conserve an essential and dwindling natural resource. Specifically, the appellants' argument, identical in substance to that of the appellee state of New Jersey in the instant case, was that:

> [T]he gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the Act is therefore a legitimate measure of conservation in the intersts of the people of the state.

Id. at 665. The Court's response to this argument was direct and unequivocal:

> *If the situation be as stated,* it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the Act attempts to do.

Id. (emphasis added). Thus, contrary to appellees' and the New Jersey Supreme Court's characterization of the "natural gas" cases, these cases indicate that this Court recognized the possible conservation values and objectives underlying the statutes in question and nonetheless invalidated the statutes as impermissibly interfering with interstate commerce. These cases, therefore, do not, as appellees seem to suggest, present the same considerations as are present in cases wherein the statutes involved had no valid conservation or health purposes, but rather sought only to protect local merchants from out-of-state competition. Consequently, the arguments of the appellees and the decision of the New Jersey Supreme Court fail to distinguish adequately the "natural gas" cases from the instant case. To the contrary, these cases, as the Supreme Court recognized, did not involve attempts to frustrate interstate competition solely for selfish economic reasons, but rather involved statutes designed to preserve a state's dwindling natural resources by restricting the use by other states of the enacting state's natural resources. This is precisely the type of action which New Jersey has attempted by shutting out from landfill sites in New Jersey wastes collected in other states.

Moreover, it is of no consequence that the "natural gas" cases prohibited exports while the New Jersey statute in question bans imports,[6] for as the Court in *Pennsylvania v. West Virginia, supra*, recognized:

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[6]In a sense, of course, P.L. 1973, c. 363, may be viewed as a prohibition of exports in that the statute seeks to eliminate the "export" of New Jersey landfill services to out-of-state customers.

> A state law, whether of the state where the gas is produced or *that where it is to be sold*, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference.

262 U.S. at 665 (emphasis added). It is apparent from the quoted language that the Court was focusing on the interruption of the flow of interstate commerce and not on whether such interruption resulted from the producing or recipient state. Similarly, the New Jersey statute, a statute of the state into which the flow of commerce is directed, produces the same discriminatory interruption of interstate commerce as was condemned in the "natural gas" cases discussed above.

In analyzing the N.J. Supreme Court's attempt to distinguish the natural gas cases from the present case by asserting that the former cases involved state efforts to "preserve and exploit a resource for selfish economic and commercial gain", 68 N.J. at 477, it should be recognized that the statutes in those cases restrained *domestic* producing companies from selling natural gas to out-of-state customers. Clearly, then, the statutes did not benefit domestic producers. Thus, any "selfish economic and commercial gain" in the natural gas cases could have come only from the possibility that the operations of domestic business *consumers* of natural gas would be furthered by ensuring those businesses an adequate gas supply. It was evidently in this respect that the Supreme Court characterized the purpose of the statute in *West v. Kansas Natural Gas Co., supra*, as "in a sense commercial – the business welfare of the state. . . ." *Id.* at 255.

This potential commercial benefit for local consumers in the natural gas cases, however, is certainly no

different qualitatively than the economic benefits realizable by domestic businesses in the instant case. Undoubtedly, by preventing New Jersey landfill operators from dealing with out-of-state waste materials, New Jersey commercial and industrial concerns will be assured more local landfill space for their own refuse. Consequently, these local businesses, as well as local residents, will be spared the higher costs associated with disposing of their refuse at landfill sites at more distant locations. That this cost factor is both a real and significant consideration is evident in the fact that both the Governor of New Jersey and the state's Department of Environmental Protection at various times acknowledged that attempts to ban importation of out-of-state wastes into New Jersey were partly motivated by the desire to control the costs of solid waste collection and disposal for the benefit of local residents and businesses. *See* Jurisdictional Statement 10-12, 38-39. If, then, it is important substantively to view the purpose of the statutes in the natural gas cases as being "in a sense commercial", it is abundantly clear that the statute in the instant case presents at least as much evidence of commercially benefiting local interests at the expense of out-of-state interests as did the statutes in the natural gas cases.

It is no answer to the discriminatory nature of P.L. 1973, c.363, to contend, as appellees have at various stages of this litigation, that landfill disposal is a "quasi-public" function related to the provision of necessary government services, and, therefore, that discriminatory legislation restricting landfill availability only to in-state businesses and residents somehow should be accorded special deference under commerce clause analysis. In *Pennsylvania v. West Virginia, supra*,

West Virginia argued that the transportation of natural gas was a quasi-public business providing essential services to West Virginia residents. Yet the Court found such argument no obstacle to invalidating legislation which restricted the availability of this natural resource to local consumers.

Moreover, the argument that New Jersey need not provide or make available essential public services to residents of other states is indeed curious in the context of the instant case wherein the waste disposal services in question are provided by *private* concerns who own and operate the landfill sites which New Jersey seeks to preserve for local residents and businesses only. We do not contend that publicly owned and operated facilities in New Jersey, such as public schools, hospitals or recreation areas, must be made available to residents of other states. If New Jersey established new *public* landfill sites or exercised its powers of eminent domain as to existing private landfill sites, and subsequently restricted those sites to wastes collected in-state, a different question might be raised. *Cf. Hughes v. Alexandria Scrap Corp., supra.*[7] But here New Jersey is

[7]To the extent *Alexandria Scrap* is relevant at all to the instant case, it appears, if anything, to support appellants' position. In that case the Court emphasized that, with respect to commerce in automobile hulks, "no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause forbids the State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 2497. Whatever the merits of the Court's holding, *see*, Brennan, J., dissenting, *id.* at 2501, it is clear that in the present case New Jersey is not "participating in the market" but rather is attempting to stop the flow of interstate commerce by a purely discriminatory statute.

directing in-state *private* businesses to cease making their facilities and services available to out-of-state residents, businesses and municipalities. Amicus submits that New Jersey cannot take such discriminatory action under the commerce clause any more than New Jersey could direct private utilities to cease dealing with out-of-state businesses or residents, *West Virginia v. Kansas Natural Gas Co., supra; Pennsylvania v. West Virginia, supra*, or any more than New Jersey could direct any other private businesses, even those of a "quasi-public" nature such as private hospitals or private schools, from offering their services to consumers in other states.[8]

In seeking to rationalize the discriminatory character of P.L. 1973, c. 363, appellees have asserted that the statute seeks to protect the public health, safety and welfare by eliminating or ameliorating purported health dangers associated with the disposal of waste materials. The assertion of such a position is somewhat curious in view of the fact that the state courts below recognized

[8]Clearly, the holding of this Court in *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), is of no help to appellees. In that case the question raised was the scope of Congress' power under the commerce clause to regulate directly certain aspects of employment of state workers employed in traditional government services. The instant case, of course, does not involve a challenge to the exercise of Congress' power to regulate commerce. Perhaps more importantly from an analytical standpoint, however, the decision in *Cities* involved *state* employees in *public* employment. Had the issue been whether a state could successfully challenge Congress' attempt to legislate regarding *private* employees in quasi-public, private businesses, such as privately owned utilities, schools or hospitals, there can be no doubt that the result would have been different. Thus, the "state sovereignty" basis for the holding in *Cities* is simply inapposite in the instant case.

that P.L. 1973, c. 363, was not aimed at purported health problems. As the trial court in *Hackensack Meadowlands*, 127 N.J. Super. at 170, stated:

> It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal. . . .

To the same effect the trial judge in *City of Philadelphia v. New Jersey*[9] stated:

> [T]he purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste . that is presented to the various disposal companies, the natural resources, the land, [and] the availability of the land will be prolonged or extended or used less quickly.

And the New Jersey Supreme Court observed:

> There is every indication that this [preventing acceleration of depletion of existing landfills] was the true reason for the enactment of the amendments to the Waste Control Act (P.L. 1973, c. 363).

68 N.J. at 465 n.10.

The appellees have never established that the importation of out-of-state wastes endangers the health or safety of New Jersey's residents. Rather, in attempting to circumvent the fact that there is no

[9]The opinion, which is not reported, is included in Appellants' Jurisdictional Statement.

qualitative difference between in-state and out-of-state wastes, the appellees have simply asserted, on the basis of incomplete and inadequate documentation, that the alleged health problems associated with sanitary landfills are necessarily aggravated by the increase in waste disposal resulting from the importation of out-of-state wastes.[10] Moreover, the appellees' allegation entirely ignores the fact that there exists strict regulation and inspection of land disposal facilities under state standards to insure the protection of public health. The rules of New Jersey's Bureau of Solid Waste Management are comprehensive in this regard. See N.J.A.C. 7:26-1 *et seq.* See also Pub. L. 92-500, 33 U.S.C.A. §1151 (Supp. 1975) (Federal Water Pollution Control Act); Pub. L. 93-523, 42 U.S.C.A. 300f (Supp. 1975) (Federal Safe Drinking Water Act). Thus, the appellees' assertions as to the relationship between the importation of out-of-state wastes and dangers to the health of New Jersey residents are simply not adequately supported in the evidence, and appellees have never attempted to refute the arguments made and the affidavits presented to the New Jersey Supreme Court demonstrating that the existing rules of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management, are totally adequate to protect the health, safety and welfare of New Jersey

[10]It is anomalous that the only exception to non-importation recognized in P.L. 1973, c. 363, is "garbage to be fed to swine in the State of New Jersey". Garbage, as defined in New Jersey, means putrescible wastes. N.J.A.C. 12:100-2.1. Such wastes are recognized as creating a greater health threat than nonputrescible wastes. The anomaly is compounded by the fact that hazardous and chemical wastes, which clearly may present health hazards far more serious than other forms of waste, are permitted into New Jersey by regulation of the Department of Environmental Protection. N.J.A.C. 7:1-4.2.

residents and the quality of New Jersey's environment.

What remains, therefore, of the asserted legitimacy of the local purposes ostensibly served by P.L. 1973, c. 363, is the contention that the statute will conserve or extend the life of existing landfills in the state.[11] Apart from the fact that the New Jersey Supreme Court's reliance on various studies undertaken at different times creates a confused and sometimes apparently contradictory assessment of the life expectancy of existing landfills in New Jersey, the extension of existing landfill life expectancy by the statute at most will be insubstantial. As the New Jersey Supreme Court recognized, the ban on importation of out-of-state

[11]At the outset, it is at least highly questionable whether a statute regulating only interstate commerce while leaving local interests untouched can properly be viewed as a conservation measure. On numberous occasions this Court has voiced its suspicions of discriminatory state statutes which purported to protect the health or welfare of its citizenry, *see, e.g., Atlantic & Pacific Tea Co. v. Cottrell, supra*, or were "cloak[ed] in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740 n. 21 (1977).

Most recently, in *Douglas v. Seacoast Products, Inc., supra*, appellant argued that Virginia statutes which prevented nonresident appellees from fishing in Virginia waters had a "legitimate conservation purpose." Specifically, appellant argued that the respective statutory provisions were, in the Court's words, a "valid response to the grave problem of overfishing of American marine stocks by foreign fleets", and "an essential enforcement mechanism for net size restrictions on menhaden fishermen." The Court responded:

> The claims are specious. Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. *A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all.*

Id. (Emphasis added).

wastes at best is a stop-gap measure which can, if effective, delay only minimally the predicted exhaustion of existing disposal sites.[12] Thus, the question is presented as to whether the imposition of a measure directly discriminating against interstate commerce can be justified when it only serves a local purpose which admittedly is insubstantial in consequence. The New Jersey Supreme Court's treatment of this question was cursory at best:

> Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. *Less than total exclusion of solid waste generated outside New Jersey would have been of no avail.*

68 N.J. at 475 (emphasis added).

Although this Court has properly been more suspect of discriminatory legislation intended to erect economic barriers against competition from out-of-state sources, the decisions of the Court have made it clear that even where legitimate areas of local concern are involved, the burden to be tolerated by the statute or regulation at issue will depend on the particular local interest and on whether such interest could be furthered by less burdensome or restrictive alternatives. *Hunt v. Washington State Apple Advertising Comm'n*, 97 S. Ct. 2434 (1977); *Great Atlantic & Pacific Tea Co., supra; Pike v. Bruce Church, Inc., supra.* With respect to the question of less burdensome alternatives, this Court has recently declared:

[12]The New Jersey Supreme Court stated, "It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%...." 68 N.J. at 461. The court did not indicate specifically by whom such an estimate was made.

> Inquiry whether adequate and less burdensome alternatives exist is of course important in discharge of the Court's task of "accommodation" of conflicting local and national interests, since any "realistic judgment" whether a given state action "unreasonably" trespasses upon national interests must of course consider the "consequences to the State if its action were disallowed."

Great Atlantic & Pacific Tea Co., supra, at 929. In this case the Court examined Mississippi's argument that the state's mandatory reciprocity regulation on milk produced in other states enabled Mississippi "to assure itself that the reciprocating State's (here Louisiana's) health standards were the 'substantial equivalent' of Mississippi's." *Id.* at 930. The Court, rejecting the argument, stated that even if Mississippi's assertion were true, "there are means adequate to serve this interest that are substantially less burdensome on commerce. . . ." *Id.*

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court considered a Madison, Wisconsin ordinance prohibiting the sale of milk in the city unless such milk had been processed at an approved pasteurization plant within five miles of the city. While the Court recognized that sanitary considerations pertaining to milk that originated in non-local areas could justify "regulat[ion] in the interest of the safety, health and well-being of local communities," *id.* at 353, the Court declared that such regulation could not stand "even in the exercise of [the city's] unquestioned power to protect the health and safety of its people, if *reasonable nondiscriminatory* alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354 (emphasis added). The Court struck down the Madison

ordinance on the grounds that such reasonable nondiscriminatory alternatives, adequate to serve local interests, existed.

In the instant case, the state of New Jersey has portrayed the present waste disposal situation in the state as a crisis situation. And the state has argued that the enactment of a non-importation statute was necessary to cope with this crisis because federal and regional solutions to the problem of waste disposal have not been forthcoming. Yet the state has failed to consider and evaluate alternatives within its reach that could alleviate the alleged problem without a blanket prohibition on the importation of wastes into New Jersey.

The state's Department of Environmental Protection ("DEP"), according to the sworn testimony of its principal environmental engineer, has not undertaken any studies to calculate the total acreage available for sanitary landfill purposes in the state of New Jersey. Thus, this critical question of the availability of suitable acreage within the state for landfill purposes was completely ignored by the New Jersey Supreme Court, and apparently has not been studied by the state agencies directly responsible for such matters. Rather, the appellees and the New Jersey Supreme Court have dwelt only on the contention that existing landfill sites will be more quickly exhausted if the importation of out-of-state wastes is allowed to continue. Even with respect to existing sites, however, the DEP's principal environmental engineer has testified that the life expectancy of existing landfills could be increased by utilizing various processing alternatives to reduce the weight and/or volume of solid waste materials. *Cf. Shredding of Municipal Solid Waste and Emerging*

Technology, National Solid Wastes Management Association Technical Bulletin (Dec. 1974). It was further stated in such testimony that the DEP, however, had not undertaken any studies to estimate the extent to which such processing alternatives could extend the life of existing landfills.

In addition, the Supreme Court of New Jersey did not discuss the availability of landfill sites outside New Jersey as a disposal alternative for wastes generated within New Jersey. Such an omission appears particularly curious in light of the practice of some New Jersey communities of disposing of wastes outside New Jersey. According to testimony of DEP's principal environmental engineer, no effort was ever made by DEP to consider the possibility of using out-of-state facilities for disposal of New Jersey wastes. This failure appears especially incongruous in light of the New Jersey Supreme Court's intimation that extraterritorial solutions to New Jersey's "crisis" were unavailable. 68 N.J. at 462-63. Ironically, the enactment of a non-importation ban threatens to completely eliminate the possibility of New Jersey residents using out-of-state disposal sites to the extent that the New Jersey statute invites sister states to retaliate by passing similar discriminatory legislation, as Pennsylvania has already done.

None of the possibilities outlined above apparently has been fully evaluated by the state of New Jersey as an alternative to a ban on importation of out-of-state wastes. Rather, the state has assumed or at least asserted the existence of a "crisis" situation and has acted precipitously without considering possible solutions other than the most drastic "solution"—blocking the free flow of interstate commerce in the transportation of waste materials into the state. Yet, in reality, the state of New Jersey's enactment of such a ban in effect dramatizes the state's reluctance to evaluate potentially available alternative approaches. In this respect, then, New Jersey's enactment of P.L. 1973, c. 363, does not reflect the unavailability of reasonable solutions to a purported solid waste "crisis", but rather illustrates the state's apparent unwillingness to explore even the most basic possible solutions, such as studying the available acreage statewide for sanitary land disposal facilities, to the solid waste problem purportedly confronting the state.

Appellees and the New Jersey Supreme Court have asserted that the impact of P.L. 1973, c. 363, on interstate commerce is only incidental. 68 N.J. at 475-76. At the outset it should be recognized that a statute the purpose and effect of which is to ban interstate commerce cannot plausibly be characterized as only incidentally affecting such commerce since, as this Court has stated, "... to prohibit interstate commerce is more than to indirectly affect it." *West v. Kansas Natural Gas Co., supra* at 249.

Congress has clearly recognized the interstate character and importance of solid waste disposal. Both in the Resource Recovery Act of 1970, P.L. 91-512, and the Solid Waste Disposal Act, P.L. 89-272, 42 U.S.C. §3251 (1970), as amended by the Resource Conservation and Recovery Act of 1976, P.L. 94-580, 42 U.S.C. §6901 *et seq.*, Congress directed the relevant federal agencies to encourage cooperative state and regional efforts in dealing with solid waste disposal, as well as to promote the achievement of reasonably uniform state and local laws pertaining to such disposal. Thus, while the regulatory sphere was left largely to the states,

Congress expressly attempted to promote approaches to solid waste disposal that transcend local jurisdictional boundaries.

P.L. 1973, c. 363, repudiates these congressional directives in the most severe manner possible, i.e., by shutting New Jersey off from the interstate transportation of waste materials. The most immediate effect of such a non-importation ban is that New York and Pennsylvania residents who have used New Jersey sites will now be prevented from utilizing such sites. Apart from the costs involved in such a redistribution of removal patterns, P.L. 1973, c. 363, if permitted by this Court to stand, threatens to create a multiplicity of non-importation statutes as the various states retaliate against one another. This effect is already evidenced by the fact that Pennsylvania, New Jersey's sister state, has enacted a non-importation ban subsequent to the enactment of and in retaliation against P.L. 1973, c. 363. See Pennsylvania Solid Waste Management Act, P.L. 788, *as amended,* 1974 P.A. 337.

This Court has repeatedly emphasized its function to assess the practical impact of a statute which affects interstate commerce. In this regard, the Court has acknowledge the importance of a statute's possible effect on interstate commerce through potential similar action of other states. In *Pennsylvania v. West Virginia,* 262 U.S. *supra*, at 596, the Court declared:

> [I]n the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution. The question is an important one; for what one may do, others may, and there are

> 10 states from which natural gas is exported for consumption in other states.

And the Court most recently restated this concern in *Great Atlantic & Pacific Tea Co. v. Cottrell:*

> To allow Mississippi to insist a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk, supra*, 340 U.S., at 356, 71 S.Ct., at 299. No "parochial legislative polic[y]," *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S., at 538, 69 S.Ct., at 665, could be more precisely calculated to open the "door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S., at 522, 55 S.Ct., at 500.

96 S.Ct. at 932.

At least eight states have passed legislation which limits in varying degrees the importation of waste materials. And it appears that a number of other states are seriously considering enactment of non-importation legislation and are thus awaiting the decision of this Court in the instant case. There can be little doubt, therefore, that should P.L. 1973, c. 363, be permitted to stand, other states will surely follow in passing similar legislation.

The effect of such legislation would be precisely the same effect as this Court has decried in numerous past decisions. *See, e.g., Best & Co., Inc. v. Maxwell,* 311 U.S. 454 (1940); *Baldwin v. G.A.F. Seelig, supra; Pennsylvania v. West Virginia, supra.* Because the statute

in the instant case reveals no clear economic motive on its face, the appellees contend that it in no way raises the threat of "economic balkanization" which was one of the chief reasons for enactment of the commerce clause. This contention, of course, ignores the obvious economic discrimination, discussed earlier, resulting from the fact that New Jersey's legislation was premised in part on the desire to minimize disposal costs for New Jersey residents and businesses at the expense of out-of-state residents and businesses who utilize private landfill sites in New Jersey.

Moreover, appellees' contention also ignores what is certain to be the cumulative effect of non-importation statutes on interstate commerce. For example, some New Jersey communities currently dispose of wastes in adjacent areas of neighboring states. Should New Jersey residents be denied access to these disposal sites, just as residents of these states have been denied access to sites in New Jersey, the effect of this denial of access would be to confine the waste disposal business within each state's own boundaries. Thus, "The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry," *Toomer v. Witsell*, 334 U.S. 385, 404 (1948), and, when viewed in conjunction with similar prohibitions enacted by other adjacent states, such as that imposed by Pennsylvania, the effect is in essence to "requir[e] business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.*, 397 U.S., *supra*, at 146.

In sum, if the statute in the instant case is allowed to

stand, the impact will not only thwart the declared congressional objective of promoting regional solutions to waste disposal problems, but will also force a significant interstate industry into an inefficient and economically damaging restructuring of its traditional business patterns.

III.

CONSIDERATION OF THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976, WHILE RELEVANT TO THIS CASE, SHOULD NOT OBSCURE THE IMPORTANT CONSTITUTIONAL ISSUE RAISED BY P.L. 1973, C. 363.

In remanding this case to the New Jersey Supreme Court on the question of whether P.L. 1973, c. 363, conflicts with the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq.* ("Act"), this Court applied the established principle that questions of preemption, which are questions primarily of statutory construction, should be resolved, if possible, before reaching the constitutional issues presented by the case before the Court.

While amicus recognizes the rationale of the Court in remanding for consideration of the supremacy clause question, amicus respectfully submits that consideration of the Act should not obscure the fundamental constitutional commerce clause issue presented in the instant case. Concededly, neither the Act nor its legislative history reveals any express intent by Congress to preempt state regulation of the discarded materials problem, except to the extent Subchapter III of the Act bars a state from establishing regulations concerning hazardous waste which are less stringent than regulations issued under Subchapter III. However, non-importation

statutes such as P.L. 1973, c. 363, and the retaliatory legislation such statutes are certain to provoke, cannot help but ultimately frustrate any efforts at achieving the kind of cooperative regional solutions contemplated by the Act. Whatever state or local initiatives Congress meant to give full play, it is doubtful that an absolute barrier at state borders is such an initiative. If one of New Jersey's options left open by the Act was to opt out of regional solutions altogether, as it has, what answer is there to the frustration of Pennsylvania or other neighboring states that may wish to pursue regional solutions urged by Congress but which have been negated by New Jersey? New Jersey's blockade, in other words, is not an action that can be isolated as a local option. It is, by its nature, an action affecting and prejudicing choices by other states and clearly undermining the purposes of the Act.

An inevitable, if not immediate, frustration of congressional purpose seems evident. However, given the prospective nature of the supremacy clause question raised by the Act, yet the unmistakably clear discrimination against interstate commerce effected by P.L. 1973, c.363, amicus respectfully submits that the Court should face the commerce clause issue. The frustration of congressional purpose—as that purpose is evidenced by the Resource Conservation and Recovery Act—should be viewed as an aspect of the constitutional question of the discriminatory and burdensome nature of P.L. 1973, c.363, on interstate commerce, *see* discussion at pp. 32-35, *supra,* without need to resolve in a statutory context the question of conflict between the Resource Conservation and Recovery Act of 1976 and P.L. 1973, c. 363. In sum, then, the crucial commerce clause issue in this case – which amicus submits is

resolvable on the basis of well-established precedents of this Court – should not be obscured, nor its resolution delayed, by the less clear supremacy clause question presented by the Resource Conservation and Recovery Act of 1976.

CONCLUSION

Public Law 1973, chapter 363, was enacted solely to bar the flow of commerce in waste material, much of which is valuable and merchantable, and all of which is the subject of a substantial interstate commerce activity. This radical approach was chosen without any meaningful consideration of alternatives that would not restrain commerce. And the use of such an approach will have minimal effect in solving the alleged problem that inspired it.

This is not a case of balancing serious environmental and conservational motives against an incidental burden on commerce, nor is this a case of a state's attempting to restrict access by nonresidents to the state's public services or facilities. Rather this is a flat prohibition on commerce – a prohibition aimed at private commercial enterprises, and meant to spare the state the burden of pursuing meaningful environmental or conservational approaches to waste management. It is an action by

New Jersey almost certain to breed similar actions in retaliation by other states. This is a classic case of discrimination against interstate commerce which cannot pass muster under the Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 13th day of January, 1978, three copies of this Brief For National Solid Wastes Management Association as Amicus Curiae were mailed with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, Attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
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FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-404.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF OF THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, STATE OF NEW JERSEY.

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TABLE OF CONTENTS.

	Page
INTEREST OF AMICUS CURIAE	1
QUESTIONS PRESENTED	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Resource Conservation and Recovery Act of 1976 P. L. 94-580, 42 U. S. C. A. § 6901 *et seq.* Is Not Federal Legislation Intended to Pre-empt the State From the Regulation of Waste Disposal	6
II. The State of New Jersey, as Any State, Has the Responsibility and Authority Through Its Police Power to Provide a Legislative Plan for Preserving and Regulating Solid Waste Disposal Facilities	9
III. Solid Waste in Its Form for Disposal Is Not an Item of Interstate Commerce and Is Subject to State Regulation and Prohibition When It Is for the Protection of a State's Citizens by Preserving the Areas Available for Sanitary Landfill as a Natural Resource	11
CONCLUSION	15

TABLE OF CITATIONS.

Cases:	Page
Askew v. American Waterways Operators, Inc., 411 U. S. 325 (1973)	7
Berman v. Parker, 348 U. S. 26 (1954)	9
Bibb v. Navajo Freight Lines, 359 U. S. 520 (1957)	12
Brotherhood of Loc. F. & E. v. Chicago, R. I. & PRR Co., 353 U. S. 129 (1968)	12
California v. Zook, 336 U. S. 714, reh. den. 337 U. S. 921 (1949)	7
City of Philadelphia, et als. v. State of New Jersey, et als., 430 U. S. 141 (1977)	6
City of Philadelphia, et als. v. State of New Jersey, 73 N. J. 562, 376 A. 2d 888 (1977)	6
Clasen v. State of Indiana, 306 U. S. 439 (1939)	13
Florida Lime and Avacado Growers, Inc. v. Paul, 373 U. S. 132 (1963)	7
Great A&P Tea Co. v. Cotrell, 424 U. S. 366 (1976)	9
Hood & Sons, Inc. v. DuMond, 336 U. S. 525 (1949)	12
Huron Portland Cement Co. v. Detroit, 363 U. S. 440 (1960)	9, 13
Pennsylvania v. West Virginia, 262 U. S. 553 (1923)	12
Pike v. Bruce Church, Inc., 397 U. S. 137 (1970)	13
Sligh v. Kirkwood, 237 U. S. 52 (1915)	11

Statutes:	
N. J. S. A. 13:1I-1 et seq. (New Jersey Waste Control Act)	2, 3, 10, 12
N. J. S. A. 13:1I-9	10
42 U. S. C. A. § 6901 et seq. (Resource Conservation and Recovery Act of 1976, Public Law 94-580)	4, 6, 7
42 U. S. C. A. § 6901(a)(4)	8
42 U. S. C. A. § 6929 (Retention of State Authority)	8
42 U. S. C. A. § 6941 (State or Regional Solid Waste Plans)	8
42 U. S. C. A. § 6942(b)	7

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OCTOBER TERM, 1977

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC. and DELORENZO—INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey

Appellees

BRIEF OF THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, STATE OF NEW JERSEY

INTEREST OF AMICUS CURIAE.

The Amicus submits this brief pursuant to Rule 42, as the County of Burlington is a body corporate and politic within the State of New Jersey; a political sub-division

therein, one of twenty-one counties. This brief is respectfully submitted in support of the position of the State of New Jersey, in an attempt to preserve those basic rights of States to protect their citizens from unnecessary danger and preserve basic land resources from irreparable environmental harm and depletion.

Burlington County is the largest county in dimension in New Jersey. In addition, the population of Burlington County is approximately 360,000 people. This County is rapidly growing, both in industry and residential population. The borders of the County extend from the Delaware River to the Atlantic Ocean. A large portion of Burlington County's population is concentrated along the Delaware River, opposite the City of Philadelphia, one of the appellants in this appeal. Burlington County is a diverse County, not only in its population but also in its economic development. The armed forces, through McGuire Air Force Base and Fort Dix, residential housing construction, industry and commercial enterprises, as well as recreation, contribute to and are essential elements of the economic makeup of Burlington County. As part of this economic diversity there are a number of sanitary landfills in Burlington County which the New Jersey Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*, regulates for the well-being and protection of New Jersey's citizens.

The development of Burlington County is intricately related to the protection of its resources, which in turn are all related to one another, including the ecology of the Pine Barrens, the County's water resources, its tidelands, its air quality, and the very limited land available to its ever increasing citizenry for waste disposal, both solid and liquid. While these characteristics are not unique to Burlington County, nevertheless it has only a specific amount of acreage available for this purpose. The New

Jersey Legislature has recognized this fact by its enactment of the New Jersey Waste Control Act.

The disposal of Pennsylvania waste in Burlington County has accelerated the depletion of acreage available for sanitary landfill. This deprives New Jersey, and particularly Burlington County, of the ability to manage this very localized resource to the fullest extent and for the longest term possible.

Burlington County still has vast areas of rural land. If the New Jersey Waste Control Act were held unconstitutional, these rural areas would become the target for vast increases of Pennsylvania and other out-of-state waste. That would create hazards for the people and damage to the sensitive ecology of these rural areas of Burlington County.

There is much to be said for the resolution of problems on a regional basis. However, Burlington County's status as a sub-region would result in its bearing the full brunt of out-of-state dumping, if the New Jersey Waste Control Act is not upheld.

This Court's decision will have national implications. However, it will also have direct impact on the quality of life of the people in these local areas which are, or will become, the repositories for waste.

QUESTIONS PRESENTED.

1. Does the Resource Conservation and Recovery Act of 1976, P. L. 94-580, 42 U. S. C. § 6901 *et seq.*, render invalid the New Jersey prohibition against the disposal of waste originating out-of-state?

2. May a state in the exercise of its police powers preserve and regulate solid waste disposal facilities in the same fashion as it does for police protection, road construction and environmental protection?

3. Is sanitary landfill space a resource, natural or otherwise, which can be protected by State regulation?

SUMMARY OF ARGUMENT.

The Amicus submits that the New Jersey Act regulates a natural resource. That resource can only be described as a very limited number of acres which are available and environmentally suitable to be considered and used for the disposal of solid waste.

Because of the ever increasing need for solid waste disposal facilities in developing counties, local municipalities are having to travel greater distances to dispose of solid waste. The dumping in New Jersey of solid waste originating outside the State of New Jersey, and deposited in New Jersey, will be accelerated. The premature depletion of this valuable resource to the extent that eventually this resource will be exhausted before its time, will force use of land that is not best suited for environmentally sound landfill. Disposable garbage and solid waste are not items of interstate commerce, and may permissibly be regulated by the several States. In addition, this waste is of such a hazardous nature, particularly in its decaying state, that the State of New Jersey to protect its citizens may prohibit its disposal in New Jersey, thereby guaranteeing that New Jersey's citizens will continue to have environmentally sound, as well as safe landfill areas for its own solid waste for many years to come, or at least until other alternatives can be found.

ARGUMENT.

I. The Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. § 6901 *Et Seq.* Is Not Federal Legislation Intended to Pre-Empt the State From the Regulation of Waste Disposal.

Previously, this Court heard argument in this matter and remanded it for reconsideration by the Supreme Court of New Jersey. *City of Philadelphia, et als. v. State of New Jersey, et als.*, 430 U.S. 141 (1977).

The basis of the remand was that only days before oral argument the President had signed into law the Resources Conservation and Recovery Act of 1976, P. L. 94-580, 42 U. S. C. A. § 6901 *et seq.* The question arose whether this new Act affected the New Jersey legislation in question through the doctrine of pre-emption.

On remand, the Supreme Court of New Jersey held that the intent of Congress to leave the regulation of waste disposal to the several states insofar as the disposal of non-hazardous waste is concerned is manifest. *City of Philadelphia, et als. v. State of New Jersey*, 73 N. J. 562, 569, 376 A. 2d 888 (1977). The Court stated:

> As to the disposal of solid waste of a non-hazardous nature, it also seems clear that there has been no federal pre-emption by virtue of this statute. On the contrary, as will be seen, the Act affirmatively encourages state action and expressly eschews any intent on the part of Congress to do more than offer guidance together with technological and fiscal support.

The Amicus takes the same position as the Supreme Court of New Jersey and urges this Court to adopt the same.

For pre-emption to occur, it must be clear that the Federal provisions are inconsistent with those of the state. The well-recognized rule concerning pre-emption is that Congress must clearly manifest its intent to preclude state action. *California v. Zook*, 336 U. S. 714, reh. den. 337, U. S. 921 (1949). *Florida Lime and Avocado Growers v. Paul*, 373 U. S. 132 (1963).

It is clear that the Federal legislation here in question does not manifest any intent to pre-empt the field or to indicate that state legislation is to be viewed as an obstacle to the effectiveness of the goals propounded by Congress.

42 U. S. C. A. § 6901 *et seq.* has as its goal the setting of minimum standards within which a state may operate. The statute requires Federal guidelines to be developed for the definition of common solid waste management problems. The Federal Administrator is to provide additional guides "to assist in the development and implementation of state solid waste management plans". 42 U. S. C A. § 6942(b).

As a generally accepted rule, the Court, where environmental interests are concerned, has been reluctant to find the pre-emption doctrine applicable. *Askew v. American Waterways Operators, Inc.*, 411 U. S. 325 (1973).

Given this Court's reluctance to find the pre-emption of State legislation where it is not clearly mandated, and particularly where there are strong environmental concerns, the appellants must define clearly where Congress has manifested a pre-emptive intent. The most conservative reading of the Federal legislation and its legislative history leads to the conclusion that pre-emption was not intended, particularly in light of the specific finding of Congress that ". . . collection and disposal of sold wastes should continue to be primarily the function of state, re-

gional and local agencies . . .", 42 U. S. C. A. § 6901 (a)(4). Congress could not have spoken more clearly.

In the area of hazardous wastes, the principal thrust of the Federal legislation is to enable the setting of minimal standards for disposal. It clearly indicates that states are free to set more stringent standards under 42 U. S. C. A. § 6929 entitled "Retention of State Authority." New Jersey's law provides for these more stringent regulations. The Federal legislation acts as the administrative guide and New Jersey's legislation is the vehicle which, while conforming to minimum Federal guidelines, carries the primary burden for the protection of its resources and its citizens. The Federal law will assist technologically and eventually financially if the state chooses to elect such assistance. 42 U. S. C. A. § 6941, Sub-Chapter IV entitled "State or Regional Solid Waste Plans" clearly sets forth its objectives as they relate to State Plans:

> The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry.

This section clearly demonstrates that rather than preempting the solid waste disposal field, Congress is striving to foster cooperation which is accomplished by Federal technological and financial assistance to both States or regional authorities. New Jersey law clearly falls within that statutory statement of objectives.

II. The State of New Jersey, as Any State, Has the Responsibility and Authority Through the Police Power to Provide its Citizens With a Legislative Plan for Preserving and Regulating Solid Waste Disposal Facilities.

The Amicus as one county within New Jersey, argues that the preservation of local land resources is within the power of the State legislature. The State legislature is the most viable body to set environmental protective standards where they pertain to solid waste disposal for its citizens.

All states retain the powers to protect their citizens in matters of local concern. *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440 (1960); cf. *Berman v. Parker,* 348 U. S. 26 (1954) are cases which support the proposition that states retain broad authority to protect their citizens. This includes the authority to protect the environment. One of the leading cases, *Great A&P Tea Co. v. Cotrell,* 424 U. S. 366 (1976), states that the Court must decide between conflicting needs of local concern and the freedom of national commerce. The New Jersey law which seeks to prohibit the disposal of out-of-state waste can only be construed as an attempt to protect the health of New Jersey residents as well as the environment, both being intricately related. The appellants do not transport products or materials considered as products of interstate commerce. The primary reason for transporting waste to New Jersey from Pennsylvania is to dispose of it—not to sell it in the commerce sense. Philadelphia is disposing of its waste in Burlington County because it is easier and quicker to do so, and New Jersey landfills are more accessible both physically and legally than in Pennsylvania. The waste disposal business conflicts with the responsibility of the state to provide for its inhabitants a

place to dispose of their own solid waste in a safe manner. New Jersey is experiencing a crisis in its search to find landfills which do not harm the environment and are within range of local municipalities. The intent of the New Jersey statute is not economic protection of landfill operators, as many New Jersey landfill operators accept out-of-state waste, but rather environmental protection and the protection of the health of the state's citizenry. P. L. 1973, c. 363, of the laws of the State of New Jersey says:

> The legislature finds and determines that since enactment of P. L. 1974 c. 39 (C13:1I—*et seq.*) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to prove an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the state are being diminished by the treatment and disposal of waste which originated or was collected outside the state and that the public, health, safety, and welfare require that the treatment and disposal within the state of all wastes generated outside of the state be prohibited. N. J. S. A. 13:1I-9.

The New Jersey law was not enacted without great consideration, and only after clear findings that the New Jersey environment and the welfare of its citizens has been unnecessarily burdened. Local environmental concerns and not interstate commerce should be the overriding consideration in preventing the transportation into a state of material which will cause the health, safety and welfare of its citizens to suffer unduly. In dealing with regulations which prevent the production within a state's borders of impure foods and articles which would spread

disease and pestilence, the Court in *Sligh v. Kirkwood*, 237 U. S. 52 (1915) held that such categories of materials are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. Garbage and commercial Wastes as well are not any different.

It is clear that local areas such as Burlington County need protection from environmentally unsound dumping. If the statute at issue is not upheld, in a matter of years New Jersey's sanitary landfills will be full and New Jersey residents will have insurmountable problems pertaining to the disposal of waste. By the proper regulating of landfills, which includes the banning of out-of-state dumping, New Jersey is protecting its residents against the heavy burden of out-of-state waste which is fast becoming a permanent part of the landscape. New Jersey is further protecting the public's health by preventing the exhaustion of present landfills at a faster rate than replacements can be found.

III. Solid Waste in Its Form for Disposal Is Not an Item of Interstate Commerce and Is Subject to State Regulation and Prohibition When It Is for the Protection of a State's Citizens by Preserving the Areas Available for Sanitary Landfill as a Natural Resource.

The disposal of solid wastes in landfills creates a multitude of environmental problems. Sanitary landfills can no longer be considered just holes in the ground. Science and experience has taught us about the great chemical reactions which occur from waste decomposition, creating dangerous methane gas and a highly polluted liquid known as leachate, which lasts as long as twenty years. As a result, only certain areas are available for safe and efficient sanitary landfills. Burlington County has a number of these

landfills which are filling rapidly. There is only so much available land which can be used as an environmentally sound landfill. When it is gone, new areas cannot be manufactured. So, in many respects, this land is as valuable a resource as any of the other natural resources which are particular to a certain area. Figures as old as 1971 show that at least 1½ million tons of solid wastes generated outside New Jersey were brought into New Jersey for disposal annually. New Jersey, being the most densely populated state in America, cannot afford to be the dumping ground for the Northeast. In particular, the Amicus, as the largest county in size in New Jersey, cannot accommodate the City of Philadelphia and other out-of-state sources to the severe detriment of its citizens through the depletion of its valuable sanitary landfill areas. It must be recognized that waste for disposal cannot be considered in the same light, in the commerce sense, as milk, *Hood & Sons, Inc. v. DuMont*, 336 U. S. 525 (1949), or natural gas, or even railroads and highways, *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923), *Brotherhood of Loc. F & E v. Chicago, R. I. & PRR Co.*, 353 U. S. 129 (1968), and *Bibb v. Navajo Freight Lines*, 359 U. S. 520 (1959), all items of legitimate interstate commerce clearly out of the states' jurisdiction to regulate.

It is important to recognize that the New Jersey Statute at issue, N. J. S. A. 13:1I-1 *et seq.* and the subsequent regulations developed by the Commissioner of the New Jersey Department of Environmental Protection, clearly permit the transportation into New Jersey of waste which is to be put to productive use or recycling.

New Jersey's prohibition is only against waste that is to be dumped or burned in incinerators for final disposal. The intent of New Jersey law is to protect the health of its residents and the environment in which they live. The statutory attempt is clearly within the power of the State.

"Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power." *Huron Portland Cement Co. v. Detroit*, 362 U. S. 442 (1960). The New Jersey Supreme Court in its recent opinion on this issue has found that New Jersey is faced with a crisis which is threefold. First, the health of its residents; Second, a severe shortage of land available for sanitary landfills; and Third, the importation of out-of-state waste severely aggravates any attempt to protect the residents and the environment of New Jersey. The police powers allow a state to prevent the importation into that state material which is a threat to public health and safety. *Clasen v. State of Indiana*, 306 U. S. 439 (1939). This case prevented the importation of animal carcasses not slaughtered for food. New Jersey law, in effect, prohibits the importation of solid waste not used in some form of production or recycling. Concerning a state act forbidding unfit produce, the Court in *Pike v. Bruce Church*, 397 U. S. 137, 143-144 (1970) stated:

> To the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is 'not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution'.

Solid wastes should not be considered differently.

The Amicus as a developing county must be assured that its existing landfills are protected and that new less environmentally sound landfills are not established, in the interest of public safety. Even today, local municipalities are having to travel greater distances at great cost to dispose of local waste. Allowing out-of-state volume dumpers

to use Burlington County will greatly affect the immediate health and safety of Burlington County residents and place even a heavier burden upon the state to find new sources for waste disposal not only for its residents but also for the waste transported into New Jersey from out-of-state, a burden which is without equity.

CONCLUSION.

The State of New Jersey is attempting to protect its citizens from the reckless depletion of available land resources suitable for sanitary landfill. If the statute at issue is struck down, out-of-state dumping in areas of delicate ecological balance such as Burlington County will go unabated, causing local governments to find new and most likely less safe and environmentally sound dumping areas. The results would lead to health and environmental consequences that the New Jersey law and other similar laws across the nation seek to avert. Sanitary landfills today are a necessary though undesirable solution to solid waste disposal. Local areas, such as Burlington County, must be protected from becoming regional dumping zones merely for convenience and economics.

The Federal legislation as Congress clearly intended should be interpreted as an aid to the states, not a pre-emption over the states. It is respectfully submitted that for the aforesaid reasons, the New Jersey Waste Control Act should be upheld.

Respectfully submitted,

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